

***United States Court of Appeals
for the Second Circuit***

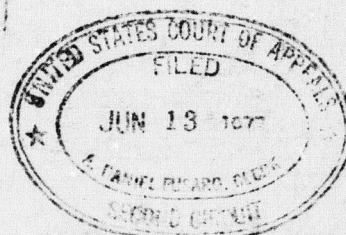


**APPELLANT'S
APPENDIX**

77-1127

b
for S

A P P E N D I X



PAGINATION AS IN ORIGINAL COPY

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21:846
21:812, 841
Offenses Charged
Consp. to viol. Narco. Laws.
Distr. & possess. of Cocaine II.
ORIGINAL COUNTS
1
13, 14

U.S. MAG
CASE NO.
BAIL • RELEASE
AMT
Fugitive
Pers. Recog.
PSA
conditions
10% Deposit
Surety Bond
Collateral
3rd
Pty Cust
Other
Status Changed
(See Docket)

KEY DATES & INTERVALS
ARREST
INDICTMENT
ARRAIGNMENT
TRIAL
4-5-76
4-29-76

SENTENCE
Disposition of Charges
Convicted
Acquitted
Dismissed
On All Charges
On Lesser *
Offense(s)
WOP
WP
On Government's Motion

MAGISTRATE
Search Warrant
Issued
Return
Summons
Issued
Served
Arrest Warrant Issued
COMPLAINT
OFFENSE
(in Complaint)
DATE
INITIAL/NO.
INITIAL APPEARANCE DATE
PRELIMINARY EXAMINATION
OR
REMOVAL HEARING
WAIVED
NOT WAIVED
INTERVENING INDICTMENT
Tape Number
OUTCOME
DISMISSED
HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst:

Daniel J. Beller
791-1992

ATTORNEYS

Defense: CJA, Ret, Waived, Self, None / Other, PD, CD

Leonard Levenson
11 Park Place, NYC 10007

* Show last names and suffix numbers of other defendants on same indictment/information.

Alvarez, et al.

4-5-76 Indictment filed. Lasker, J.
Indictment ordered sealed. Lasker, J.
4-20-76 Indictment ordered unsealed. B/W ordered. B/W issued.
Indictment ordered resealed. Brieant, J.
4-21-76 Indictment ordered unsealed. Brieant, J.
4-22-76 Filed Writ of H/C ad Pros. issued and returned 4-29-76.
4-29-76 Deft. produced on Writ (without Atty.) Court directs a not guilty plea be entered. Case assigned to Judge Owen for all purposes. Atty. directed to report to chambers immediately. MacMahon, J.
5-21-76 Dft. Leoluca Guarino (Atty. Leonard Levenson Present) Relieved as counsel... Owen J.
6-1-76 All Motions Rtn Today Jun 1st are Adjourned to June 4th @2:00 P.M.
6-3-76 Filed transcript of record of proceedings, dated 4-24-76 - /8:30
6-4-76 Dft. Refuses the Assigned Counsel. Court Orders him to proceed Prose.... Owen J.

EXCLUDABLE DELAY

(a) (b) (c) (d)

IV. PROCEEDINGS (Continued)

PAGE TWO

EXCUSABLE DELAY

Date of Entry Date of Entry Date of Entry Date of Entry

A. Filing of Complaint or Petition for Habeas Corpus or Writ of Habeas Corpus per 18 U.S.C. 4244.

B. NARA Examination (28 U.S.C. 29021)

C. State or Federal trial on other charges.

D. Interlocutory Appeals.

E. Hearings on pretrial motions.

F. Transfers from other districts per F.R.C.P. Rules 20, 21 & 40).

G. Defendant Motion is actually under advisement. Period of up to 30 days is excusable per 3161(h) (1) (G).

H. Miscellaneous Proceedings: Probation or Parole revocation, Deportation, Extradition.

I. Prosecution deferred by mutual agreement.

J. Unavailability of defendant or essential witness.

K. Period of mental or physical incompetence of defendant to stand trial.

L. Period of NARA Commitment or Treatment.

M. Superseding indictment and/or new charges.

N. Defendant awaiting trial of Co-defendant when no severance has been granted.

O. Continuances Granted per 3161(h) (8) (i.e. ends of justice or complexity of case outweighs defendant's interests)

P. Time between guilty plea and plea withdrawal.

Q. Grand Jury indictment extended per 3161 (b).

1/6 Filed CJA 20 Copy 2 - approving payment to Leonard Levenson, 11 Park Place, NYC 10007 as counsel for dft.

2/6 Filed CJA Copy 5 - appointing counsel for dft. - Leonard Levenson, 11 Park Place, NYC 10007.

Filed Gov'ts Bill of Particulars.

3/6 Filed Opinion #44378. The Gov'ts Memorandum of law 17 Matters with prepared to accede as to each dft. as indicated, The Gov't concession is made the order of this court & the Gov't is to forthwith comply therewith.....Owen J. (mailed notice)

4/6 Filed Order that each dft. represented by counsel who is appointed under Criminal Justice Act is authorized to retain investigation services & expend up to the statutory limit of \$300.00 & dfts. may at their option retain the named investigator & apply their authorized moneys severally to his fee as allowed by this Court...Owen J. (mailed notice)

5/6 Filed order that all voir dire Questions are to be submitted by 7-14-76 OWEN.J. m/n/.

6/6 Filed Opinion #44673. Deft's John Capra, Steven Dellacava and Leoluc Guarino, are collectively sever for a later trial. Beyond the foregoing, all motions to sever are denied. OWEN.J. m/n.

7/6 Suppression held.....Owen J.

8/6 Filed Memorandum & order. It is ordered in the interests of justice, that the trial of this action is adjourned from 7-19-76 to 8/10/76, to begin at 10:00 a.m. in Courtroom 318Owen J. (mailed notice)

9/6 Filed Memorandum Order Trial has been adjourned to 8-10-76, proposed voir Dire questions due 8-3-76.....directly in chambers.....Owen J. (mailed notice)

10/6 Filed Opinion #44760. All Motions of dfts. as moved for discovery & inspection & bill of particulars, are denied. Certain dfts. moved for psychiatric information as indicated The Foregoing is so ordered.....Owen J. (mailed notice)

11/6 Filed transcript of record of proceedings, dated 5-6-76

12/6 Filed transcript of record of proceedings, dated 5-7-76

13/6 Filed transcript of record of proceedings, dated 5-20-76

14/6 Filed transcript of record of proceedings, dated 5-10-76

Cont'd.

FINE AND RESTITUTION PAYMENTS

RECEIPT NUMBER C.D. NUMBER DATE RECEIPT NUMBER C.D. NUMBER

DATE	PROCEEDINGS
	Owen J.
7-16-76	Filed Opinion #44768. All motions seeking disclosure of Gov't witnesses are denied. Dfts. motions to disclose identity of cooperating dfts. denied. Various Dfts. move to dismiss indictment on grounds of preindictment delay, motions denied. Movants seeking order enjoining Gov't from cross examining them about past record, any movant seeking this issue, hearing will be held on 7/21/76 in Room 318. All other motions denied as indicated.....Owen J. (mailed notice)
7-25-76	Filed Opinion #44769. Gov't order to deliver in camera inspection as indicated.Owen J. (mailed notice)
8-9-76	All Counsel Present for P.T.C
8-10-76	Trial begun - Interpreters Gustavo Hoffman & Anita Zevallos Sworn. Jury Selection begun.
8-11-76	Jury Selection Cont'd.
8-12-76	Jury Selection Cont'd - Suppression hearing cont'd & concluded.
8-19-76	Filed Memo. on Unsigned Order to Show Cause. I decline to sign this order to Show Cause.....Owen J. (mm) Dft. Notified by Prose Clerk
9-10-76	Filed W/H/C Ad Prosequendum. Writ Satisfied. 9-7-76 Owen J.
8-18-76	Trial Cont'd - Opening Cont'd
8-19-76	Trial Cont'd
8-20-76	Trial Cont'd
8-23-76	Trial Cont'd
8-24-76	Trial Cont'd
8-25-76	Trial Cont'd
8-26-76	Trial Cont'd
8-27-76	Trial Cont'd
8-30-76	Trial Cont'd
8-31-76	Trial Cont'd
9-1-76	Trial Cont'd
9-2-76	Trial Cont'd
9-3-76	Trial Cont'd
9-7-76	Trial Cont'd Hearing Held Concerning Authority of Tape 3505-05 of concerning Dft. Interome Court finding: Tapes Are Original Unaltered version....Owen J/
9-8-76	Trial Cont'd
9-9-76	Trial Cont'd
9-10-76	Trial Cont'd
9-13-76	Trial Cont'd
9-14-76	Filed Order that each counsel who is appointed under the Criminal Justice Act, is authorized to file an interim voucher for services rendered under the Criminal Justice Act from the date of their appointment up to & including 9/10/76, the actual trial having commenced on 8/10/76 & continuing & the assigned counsel may file a final voucher subsequent to the termination of trial as to their respective dfts. subject to the ultimate allowance of this court....Owen J. (mm)
9-23-76	Filed True Copy of USCA Mandate. District Court Order is Affirmed. Judgment Ent. 9-23-76 Clerk, Ent. 10-1-76. (mm)

PROCEEDINGS

16 Filed Gov'ts Application for an order of immunity as to Peter J. Fiumara, witness.

17 Filed Order that Peter J. Fiumara give testimony & that any testimony etc. shall be subject to immunity provisions as indicated. This Order shall not take effect until Peter J. Fiumara refused to testify as indicated.....Owen J. (mn)

Trial Cont'd

Trial Cont'd

Trial Cont'd

Trial Cont'd

Trial Cont'd

Trial Cont'd

Trial Cont'd

Trial Adj.

Trial Cont'd

Trial Cont'd

Trial Cont'd

Trial Cont'd

Trial Cont'd - Gov't Rests - Motions

Trial Cont'd - Motions cont'd

Trial Cont'd

Trial Cont'd

76 Filed Dfts. Notice of Motion & supporting affdvt for an order preventing Gov't of using testimony of Jack Brown, etc. against dft. & Etc. Ret. Sine Die.

76 Filed Dfts. Motion for Psychiatric Examination of the Gov't witness Jack Brown, to Determine his competency to testify.

Filed Memo. End. on dfts. motion dtd. 10-21-76. Motion denied.....Owen J. (mn)

Filed Redacted Indictment.

Filed Transcript of record of proceedings, dated Jun 12, 24, Jul 12, 12, Aug 10, 11, 12-1976
 Filed Transcript of record of proceedings, dated Aug 10, 11, 12, 13-1976
 Filed Transcript of record of proceedings, dated Aug 19, 20, 23, 24-1976
 Filed Transcript of record of proceedings, dated Aug 25, 26, 27, 30-1976
 Filed Transcript of record of proceedings, dated Aug 31, 1976
 Filed Transcript of record of proceedings, dated Sep 12, 13, 14, 15-1976
 Filed Transcript of record of proceedings, dated Sep 9, 10, 13, 14, 15-1976
 Filed Transcript of record of proceedings, dated Sep 16, 17, 20, 21, 22-1976
 Filed Transcript of record of proceedings, dated Sep 23, 24, 27, 28, 29-1976
 Filed Transcript of record of proceedings, dated Sep 30-1976
 Filed Transcript of record of proceedings, dated Oct 1, 5, 6, 7, 8-1976
 Filed Transcript of record of proceedings, dated Oct 19, 21, 22, 25, 26-1976
 Filed Transcript of record of proceedings, dated Oct 27, 28, 29-1976
 Filed Transcript of record of proceedings, dated Nov 1, 2, 3, 4-1976

76 Filed Dfts. Notice of Motion & supporting affdvt. for Order dismissing the Indictment. Ret. 12-8-76.... Sent to Broderick

76 Filed Affdvt. by Govt. for W/H/C Ad Prose. Writ Issued Ret. 12-10-76

76 Pre Trial Conference Held as to dfts. Guarino, etc. Trial Jan. 10, 1977 & conference adj. to Dec. 14, 1976 (4:30 P.M.)....Broderick J.

(Cont'd)

DATE	PROCEEDINGS
12-14-76	Pre Trial Conference Held. as to dfts. Guarino, etc.....Broderick J.
12-17-76	Pre Trial Conference Held as to Dfts. Guarino, et al.....Trial Jan 10, 1977 & conference adj to Jan. 4, 1977 @ 5:00 P.M.....Broderick J.
12/22/76	Filed Govts. W/H/C Ad Prose. with marshals ret.
12/22/76	Filed Govts. W/H/C Ad Prose. with marshals ret.
12/23/76	Filed transcript of record of proceedings, dated Nov 5 67, P. 2, 10, 11, 12. (1976)
12-13-76	Filed NOTICE OF MOTION & MOTION to correct the docket entries. Affidavit attached.
12-28-76	Filed NOLLE PROSEQUI - GRANTED, so ordered BRODERICK, J. in his
12-29-76	Filed ORDER - the deft seeks/motion an order dismissing with prejudice, the instant indictment as to him as is denied. So ordered Broderick, J.
1-5-77	Filed MEMORANDUM DECISION - on motion papers filed 12-13-76 for an order correcting various docket entries, etc. Because of the Nolle being entered in this case as to this deft, the motion is denied as moot. So ordered Broderick, J. m/n.

OJB:art

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: WARDEN
Atlanta Penitentiary
Atlanta, Georgia

and United States Marshal
Southern District of New York,

GREETING: 76 Cr. 324

YOU ARE HEREBY COMMANDED to have the body of
LEOLUCA GUARINO 78281-158 now detained in

under your custody as it is said, under safe and secure
conduct before the Judges of our District Court within
and for the Southern District of New York, at the United
States Court House, Foley Square, New York, New York, on
April 29, 1976 at 10:30 o'clock in the fore-
noon, there to appear and plead

and immediately after the said LEOLUCA GUARINO
shall have been discharged or convicted and sentenced on
said indictment, that you return him to the said
Atlanta Penitentiary
under safe and secure conduct, and have you then and
there this writ.

WITNESS the Honorable DAVID N. EDELSTEIN, Chief
Judge of the United States District Court for the Southern
District of New York, at the United States Court House,
Foley Square, New York, N.Y., this 22nd day of April,
1976.

Raymond F. Burghardt
Clerk, United States District Court,
Southern District of New York

The within writ is hereby allowed.

Charles J. Quinn
United States District Judge

I hereby certify that the following is a true and correct copy of the original document as it appears in the files of the Department of Justice.
 On 4/27/76, a copy of a letter from the U.S. P. Attorney, La to Mr. C. Newell, was received.
 This same day.

Frank Sullivan
 by Robert White

APR 27 1976

4/29/76

Mr. C. Newell

Not returned to
 U. S. D. J.

Not returned to
 U. S. D. J.

9-7-76 AS per
 AUSA
 Bellin

Not returned to
 U. S. D. J.

9/8/76 Mr. Rivera M.C.C.
 SO ADVISED WRIT SATISFIED
 AND WILL PUT ON NEXT
 BUS FOR RETURN TO
 ATLANTA
 E.B. E. D. D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA,

Plaintiff,

76 Cr. 324

-against-

JUAN ANTONIO ALVAREZ, et al.,

Defendants.
-----x

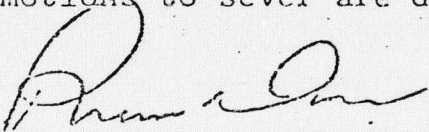
OWEN, District Judge

Numerous of the thirty-three defendants in this narcotics indictment have moved to sever on the ground that there can be no single conspiracy here and that a joint trial would be prejudicial.

The motions require me to make a pretrial assessment in an area that has caused much discussion even after trial. I have studied the indictment and reviewed the grand jury minutes as requested by the parties. In the light of the various authorities that have been cited to me, I hereby sever defendants John Capra, Steven Dellacava and Leoluca Guarino collectively for later trial. Beyond the foregoing, all motions to sever are denied.

So Ordered.

June 24, 1976.


United States District Judge

Oct. 1976

Judge Owen
U.S. District Court
Foley Square
New York, N.Y.

Judge Owen;

A copy of the docket entry sheet on 76 er. 0324 was received by me, from the Court on Sept. 29. I respectfully inform this Court, that the docket entries do not reflect the numerous motions and letters filed by me, pro-se, from May to Sept.. Will the Court please clarify this situation, and send me an itemized list of all such letters and motions received with the status of each.

In my last letter-motion to the Court, I objected to being removed from the district in violation of the Writ Ad Prosequendum. Said writ states in part, that I am not to be removed from the Southern District, " until discharged or found guilty." Will the Court please clarify my Status and send me a copy of the Writ of Satisfaction, filed in order to return me to Atlanta. Your prompt reply will relieve some of the anxiety and tension my family and myself are laboring under.

Leoluca Guarino 78261

dated: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

76 Cr. 0324

SIRS:

PLEASE TAKE NOTICE, that upon the indictment, all proceedings herein had, all motions and/or letters previously submitted, and upon the annexed affidavit and memorandum of law, LEOLUCA GUARINO, proceeding pro se, will move this Court at the December Term thereof to be held at the Court-house at 10 A.M. on the 7th day of December, 1976, in the forenoon of that day or as soon thereafter as the defendant's prayer for relief can be heard, for an Order dismissing the indictment herein, No. 76 Cr. 0324, ^{with prejudice,} on the grounds that the Second Circuit's recent holding in United States V. Mauro (20 CrL 2146) mandates said dismissal; and on the further grounds that the defendant has been denied his right to a prompt and speedy trial. And for such other and further relief as to this Court may seem just and proper.

DATED: This ____ day of December, 1976.

Yours etc.,

Leoluca Guarino
Defendant pro se
PO Box PIB #70281
Atlanta, Georgia 30315

To: United States Attorney's Office
Southern District Of New York
U.S. Courthouse--Foley Square
New York, New York State 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

76 Cr. 0324

AFFIDAVIT

STATE OF GEORGIA)

COUNTY OF FULTON)

ss:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says;
that he is the defendant in the above captioned matter, and that he makes
the instant affidavit in support of his motion based on the following:

1. That on April 22, 1976, the defendant-affiant appeared before Judge Imboden to answer to indictment No. 76 Cr. 0324, pursuant to the issuance of a Writ Of Habeas Corpus Ad Prosequendum.
2. That shortly thereafter this Court assumed jurisdiction of the cause of action for purposes of trial, i.e., on May 7, 1976.
3. That the defendant-affiant has proceeded pro se at every stage of the proceedings herein, and a severance as to the defendant-affiant and two others was granted by this Court on June 24, 1976, and trial as to approximately twenty-two (22) other co-defendants commenced before your Honor on or about August 8, 1976, and concluded sometime in the latter part of October or early November.
4. That on or about September 9, 1976, this Court signed an order for the removal of the defendant-affiant from MCC per the request of Assistant United States Attorney, Beller. This was done notwithstanding that the defendant-affiant was proceeding pro se and that from the MCC he was in a position to interrogate potential witnesses and prepare his defense.
5. That upon information and belief the AUSA, Beller, was overheard saying that "Guarino was a trouble maker and that he (Beller) did not want him in New York" or words very similar in substance.

6. That upon information and belief Belier's basis for labeling the defendant-affiant "a trouble maker" stemmed from the numerous motions that the defendant-affiant was submitting. One of these motions involved a chart that the prosecutor was using for the petit jury's benefit which ostensibly carried the defendant-affiant's name and alleged position in the conspiracy which was then being tried by this Court. Another motion challenged the constitutional propriety of the prosecutor making use of wire taps, at said trial, that had been declared as unconstitutionally obtained by the Second Circuit in the defendant-affiant's first conviction.

7. That the above mentioned motions were made immediately after the defendant-affiant conferred with those co-defendants who were then presently on trial before this Court, and who, together with the defendant-affiant, were lodged at the MCC.

8. That since the writ of habeas corpus ad prosequendum states, in no uncertain terms, that the defendant-affiant is/was to be produced before the Southern District of New York to answer to indictment No. 76 Cr. 0324 "and immediately after the said LEOLUCA GUARINO shall have been discharged or convicted and sentenced on said indictment, that you return him to the said Atlanta Penitentiary.....", the terms of the writ were violated by removing the defendant-affiant from the MCC and returning him to the Atlanta penitentiary without having reached a final determination of the indictment and charges therein.

9. That the defendant-affiant has at no time requested an adjournment of the case, nor consented to one.

10. That the defendant-affiant swears to the truth of the contents of this affidavit except as to those matters that are based on information and belief and these he believes to be true and affixes his signature hereto accordingly.

Yours etc.,

Leoluca Guarino #76281
Defendant-Affiant pro se

Sworn to before me this
2 day of December, 1976.

Charles C. Mott

WHEREFORE, under the facts and the law the defendant, Leoluca Guarino, respectfully prays that this Court cause to issue an order dismissing the instant indictment with prejudice, or for such other and further relief that is responsive to due process and equal protection of the laws.

Respectfully submitted,

Leoluca Guarino
Defendant pro se
PO Box PMB #78281
Atlanta, Georgia 30315

CERTIFICATE OF SERVICE
BY MAIL

STATE OF GEORGIA)
COUNTY OF FULTON)

Leoluca Guarino, after being duly by law sworn, deposes and says; that on this __, day of December 1976, he served a copy of the instant papers upon the United States Attorney for the Southern District of New York by placing same in the PMB Box, in a sealed envelope for purposes of being forwarded to said United States Attorney via the United States Mail, all of which should constitute sufficient proof of service.

Yours etc.,

Leoluca Guarino #78281

Sworn to before me this
2 day of December, 1976.

Charles C. Mott

NOTARY PUBLIC

My Comm. Expires

1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

76 Cr. 0324

LEOLUCA GUARINO, et al.,

DEFENDANT.

DEFENDANT'S PRO SE MEMORANDUM
OF LAW

Indictment No. 76 Cr. 0324 was a sealed indictment that was unsealed on or about April 22, 1976. Thirty-three (33) defendants were named in said indictment for various alleged violations of the Controlled Substance Act of 1971 and the old narcotics laws as well. Prior to trial the defendant, LEOLUCA GUARINO, and two co-defendants, JOHN CAPRA and STEVEN BELLACAVA, were granted severances by this Court. Trial proceeded as to the remaining co-defendants who were then in actual custody, i.e., twenty-two codefendants. This trial was concluded approximately four (4) weeks ago and the defendant herein has not commenced trial. It should be noted that the defendant, LEOLUCA GUARINO, has never sought nor has he acquiesced to any adjournment or postponement of his trial.

On April 22, 1976, United States District Judge, Charles L. Bricant, Jr., of the Southern District Of New York signed a Writ Of Habeas Corpus Ad Prosequendum for the removal of the defendant herein from the Atlanta Federal Penitentiary and for his production before the Southern District Court to answer to indictment No. 76 Cr. 324. Said writ stated as follows:

"YOU ARE HEREBY COMMANDED to have the body of
LEOLUCA GUARINO 78231-158 now detained in the

under your custody as it is said, under safe and secure conduct before the Judges of our District Court within and for the Southern District of New York, at the United States Court House, Foley Square, New York, New York, on April 29, 1976 at 10:30 o'clock in the forenoon, there to appear and plead and immediately after the said LEOLUCA GUARINO shall have been discharged or convicted and sentenced on said indictment, that you return him to the said Atlanta Penitentiary....."

In compliance with the writ of habeas corpus the defendant was released by the Warden of the Atlanta Penitentiary to the U.S. Marshalls for transportation to the jurisdiction of the Southern District of New York, and on April 29, 1976, he appeared before Judge MacMahon, where he entered a plea of not guilty, by virtue of former jeopardy, to indictment NO. 76 Cr. 324. The plea was entered in a pro se capacity. The case was then adjourned and referred to this Court. (See entry "Writ adjourned to" on the back of the Writ Of Habeas Corpus Ad Prosequendum, appended hereto as Exhibit A).

On May 7, 1976, the defendant appeared before this Court and this Court adjourned the cause of action. (See this Court's endorsement on the back of Exhibit A, "Writ adjourned to"). Notwithstanding that the defendant made many court appearances after May 7, 1976, the next and only other entry to appear on the back of Exhibit A was entered, and signed, by this Court "As per AUSA Beller" on September 9, 1976, and certified that the "Writ (was) satisfied".

At this juncture it is important to know that when the defendant was apprised, at the HCC, that he was being returned to the Atlanta Penitentiary he twice phoned this Court's clerk, Mark Stein, and pointed out to him that the terms of the writ were being violated by ordering his removal without having first been "discharged or convicted and sentenced on said indictment", which are the terms of said writ. Consequently, the defendant sought, and requested, written clarification as to his status. To date no such clarification has been received from the clerk, or from this Court, by the defendant who has been proceeding pro se at all stages of the proceedings against him. Additionally, the defendant's brother, Patrick Guarino, Esq., has also sought clarification to no avail.

It should also be judicially noted that the defendant voiced his objections to being removed from HCC to Mr. Abe Rivera, Counsellor, at the HCC, and that Mr. Rivera phoned this Court to ascertain whether in truth the writ had been satisfied and was "so advised writ satisfied and will put (the defendant) on next bus for return to USP Atlanta." (See entry on the back of the Writ Of Habeas Corpus Ad Prosequendum, Exhibit A appended hereto).

The United States Second Circuit Court Of Appeals, in United States V. Mauro (20 CrL 2146, October 17, 1976), a case dealing with the Interstate Agreement on Detainers, held that a state prisoner that was returned to the state authorities without first having been tried on the charges for which the requesting state obtained his custody would lose any right to try the defendant, and that the outstanding indictment would be dismissed with prejudice.

Mauro, was serving a sentence in New York State, and upon an outstanding federal indictment he was brought down to the Eastern District of New York via the Interstate Agreement on Detainers; however, Mauro, as well as a co-defendant, were returned to state prison without having been tried on the federal indictment. Subsequently, the Government again sought custody of Mauro and, as on the first occasion, removed him from state custody via a Writ of Habeas Corpus Ad Prosequendum. Upon a motion to dismiss the indictment with prejudice, on the grounds that the Government had violated the terms of the Interstate Agreement Act by returning him the first time without having tried him, the district court per Bortels, J., dismissed the indictment with prejudice. (United States V. Mauro, 414 F. Supp. 358 (EDNY 1976)). The Government sought an appeal from the district court's adverse decision. The Second Circuit Court of Appeals ruled that:

"...We conclude that the writ of habeas corpus ad prosequendum is a detainer entitling the state inmate to the protection provided in Article IV and specifically to a trial before his return to the state institution." (United States V. Mauro, 20 CrL 2146, 2147; emphasis supplied)

While it is true that the above case primarily revolved around the Interstate Agreement Act, it is equally true that the Second Circuit equated a writ of habeas corpus ad prosequendum as a detainer that once issued must conclude with the final adjudication of the outstanding indictment and that anything less demands the dismissal of an indictment with prejudice.

A natural corollary of the above is that when a federal prisoner is removed from a federal prison via a writ of habeas corpus ad prosequendum that he too must be tried before been returned to the custody of the warden who originally released him to answer to the writ of habeas corpus ad prosequendum. To require a different result would be a denial of the equal protection of the law concept which is inherent in the due process clause of the Fifth Amendment.

- 15 -

In this light it is imperative to note that the Supreme Court has held that:

"The Fifth Amendment...does not contain an equal protection clause....But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness..... as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." (Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 23 L.Ed. 684 (1954))

That the instant case arises in a setting of a criminal nature as opposed to civil rights setting of the Bolling case is irrelevant. Germane to the case at bar is the underlying rationale that compels the Federal Government to apply equal protection of the laws, with equal vigor, across the board. Hence, what the Government is prohibited from doing in a federal-state situation it cannot, consistent with due process, do in a federal-federal situation where the writ of habeas corpus ad prosequendum has been resorted to. For to permit the Government to employ different standards to those mandated by Bolling, supra, and to those articulated by the Nauro court would be an invidious discrimination so unjustifiable as to be violative of due process. (See e.g., Shapiro v. Thompson, 394 U.S. 613, 22 L.Ed.2d 600, 89 S.Ct. 1322, 1335 (1969), citing Bolling, supra, and Schneider v. Rusk, 377 U.S. 163, 168, 84 S.Ct. 1187, 1190, 12 L.Ed.2d 213 (1964)).

The case at bar presents additional but equally compelling reasons for a dismissal of the indictment with prejudice, viz., an unnecessary delay in disposing of the charges. This is readily discernible when we consider that

"(u)nder the Rules Regarding Disposition of Criminal Cases, adopted in this circuit in 1971, the government must be ready for trial within six months of indictment unless an enumerated exception applies." (United States v. Salzmann, 20 CrL 2133, 2134 (2nd Cir. 1976))

In his concurring opinion Judge Feinberg held that "the burden is on the government to be ready for trial". (Id. at p. 2135).

WHEREFORE, under the facts and the law the defendant, Leoluca Guarino, respectfully prays that this Court cause to issue an order dismissing the instant indictment with prejudice, or for such other and further relief that is responsive to due process and equal protection of the laws.

Respectfully submitted,

Leoluca Guarino
Defendant pro se
PO Box PNB #78281
Atlanta, Georgia 30315

CERTIFICATE OF SERVICE
BY MAIL

STATE OF GEORGIA)

COUNTY OF FULTON)

Leoluca Guarino, after being duly by law sworn, deposes and says; that on this ____, day of December 1976, he served a copy of the instant papers upon the United States Attorney for the Southern District of New York by placing same in the PNB Box, in a sealed envelope for purposes of being forwarded to said United States Attorney via the United States Mail, all of which should constitute sufficient proof of service.

Yours etc.,

Leoluca Guarino #78281

Sworn to before me this

2 day of December, 1976.

Charles C. Moore

Notary Public
July 2, 1975
Ga.

DJB:art

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: WARDEN
Atlanta Penitentiary

and United States Marshal
Southern District of New York,
MIDDLE DISTRICT OF GEORGIA

7L C. 324

(R0)

GREETING:

YOU ARE HEREBY COMMANDED to have the body of
LEOLUCA GUARINO, 78281-158 now detained in the
Atlanta Penitentiary

under your custody as it is said, under safe and secure
conduct before the Judges of our District Court within
and for the Southern District of New York, at the United
States Court House, Foley Square, New York, New York, on
December 10, 1976 at 10:30 o'clock in the fore-
noon, there to appear ~~and~~

and immediately after the said LEOLUCA GUARINO
shall have been discharged or convicted and sentenced on
said indictment, that you return him to the said facility
under safe and secure conduct, and have you then and
there this writ.

WITNESS the Honorable DAVID N. EDELSTEIN, Chief
Judge of the United States District Court for the Southern
District of New York, at the United States Court House,
Foley Square, New York, N.Y., this 7th day of
December, 1976.

Raymond F. Burkhardt
Clerk, United States District Court
Southern District of New York

The within writ is hereby allowed.

Constance Baker Motley
United States District Judge

that a
is this day
in court action,
of this Court.

19

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

LEOLUCA GUARINO,

Defendant.

Attorney for

United States Attorney

Attorney for

that the within
for settlement and sig-

at the office of
United States Court-
house of Manhat-
tan at the day of
19:10 o'clock in the
thereafter as court-

19

etc.,

United States Attorney

Attorney for

Attorney for

WRIT OF HABEAS CORPUS AD
PROSECUTENDUM

ROBERT B. FISKE, JR.

United States Attorney
791-1992
Attorney for USA

Due service of a copy of the within is here
by admitted.

New York, 19

Attorney for

To

Attorney for

12/9/76
ADVISED BY
WRIT
AUSA
VOIDED
Beller
Frank A. Tuland
Lm
By MSB/say

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

: 76 Cr. 324 (VLB)

v.

JOHN CAPRA, a/k/a "Johnny Hooks,"
LEOLUCA GUARINO, and STEVEN
DELLACAVA, a/k/a "Beansie,"

Defendants.

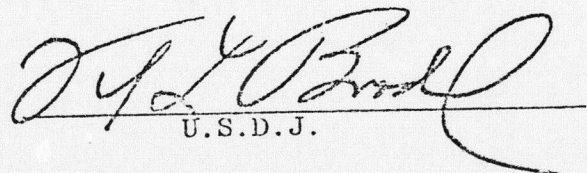
-----X
VINCENT L. BRODERICK, D.J.

The Government has been granted leave to file a nolle
prosequi herein with respect to defendants John Capra, Leoluca
Guarino and Steven Dellacava. Defendant Guarino's pro se
motion seeking an order dismissing with prejudice the instant
indictment as to him is therefore denied as moot.

Because a nolle prosequi does not have, by its terms, a
"with prejudice" effect, the Court, in granting leave to file
it, has carefully considered the substantive representations
contained in the Government's nolle prosequi and has satisfied
itself that the nolle prosequi is not being used to circumvent
the time requirements of the Speedy Trial Act, 18 U.S.C.
Section 3161, et seq.

SO ORDERED.

December 28, 1976


U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

76 Cr. 324 (VLB)

NOTICE OF APPEAL

SIRS:

* PLEASE TAKE NOTICE that the defendant hereinabove named hereby appeals to the Second Circuit Court of Appeals from the Order entered in the Southern District of New York, Vincent L. Broderick, D.J., on December 28, 1976, denying as moot the defendant Guarino's pro se motion seeking dismissal of the above captioned indictment, with prejudice, for lack of a speedy trial. The defendant appeals from each and every part of said order.

DATED: January 6, 1977.

Yours etc.,

Leoluca Guarino

Leoluca Guarino
Defendant-Appellant, pro se
PO Box PMB #78231
Atlanta, Georgia 30315

Sworn to before me this
6th day of January, 1977.

Charles C. Mott

Notary Public for the State of New York
My Comm. Expires 12/31/78

JAN 12 1977

JAN 12 1977

January 6, 1977

Honorable Sir,

On January 3rd instant, I received your Honor's order denying my pro-se motion to dismiss indictment No. 34, with prejudice, for lack of a "Speedy Trial". The motion was deemed moot, by virtue of this Court granting the Government a nolle prosequi.

I again, respectfully call to your Honor's attention the fact that I have been proceeding pro-se since the inception of the proceedings against me, and that I believe that I am entitled to a copy of the 14-part nolle prosequi, submitted by the Government, as well as a copy of your Honor's Order, granting the nolle prosequi. As your Honor knows, these are vital and central to pursuing appellate review.

Without questioning the integrity or good faith of your Honor's actions, I must, however, question those of the Government Attorney. Past experience has taught me that Government Attorneys are not beyond perpetrating fraud, deceit, chicanery and or other reprehensible tactics. The instant case contains issues of first impression, viz; can a nolle prosequi be entered after a defendant has

2

moved for a dismissal with prejudice for lack of a Speedy Trial? The Legislative History behind the Speedy Trial Act of 1974, contemplates a different posture than that reached by this Court. This is clearly reflected in the following:

"Pursuant to questions that arose during discussion of the dismissal sanction, several points with respect to A.D. 17409 deserve clarification: first, as already indicated above, dismissal is mandatory but not automatic, since the defendant is expressly required under section 3162(a)(2) to move for dismissal if not brought to trial within the prescribed time; second, it should be clear that the attorney for the Government is free to contest the granting of a motion to dismiss on the basis of error by noting his objections and taking appeal in the proper manner; ... (U.S. Code Congressional and Administrative News, P.L. 93-619, p. 7431, emphasis in original).

Briefly outlined the time sequence involved herein is as follows: Sentence was granted on June 24, 1976. On December 2, 1976 I submitted a duly notarized motion (pro-se) for dismissal with prejudice, and sometime thereafter the Government nolle prossed. Obviously a question of constitutional proportion (i.e. Statutory

3

interpretation with Congressional intent) has been propelled into the judicial arena, that must be clarified upon Appellate review, viz., can a Government submitted nolle prosequi be maintained after the defendant moves via the Speedy Trial Act of 1974.

Additionally, the nolle prosequi has the obvious effect of precluding me from participation in rehabilitative programs because the Institution views it as an open indictment. I was initially compelled to drop out of a college program, and I am presently precluded from rejoining college because of the mental anxiety of not knowing when the Government will capriciously and arbitrarily decide to "get Reolua Guaino". Last but not least, collectively, the Government's behavior, will serve as a roadblock that will negate my chances for parole and virtually preclude me from a meaningful Parole Hearing. I am respectfully yours

1-6-77
Charles M. M. P.

Parole Officer: Authorized by the Act of
July 7, 1955 to Administer Oaths (18 U.S.C. 3604)

Reolua Guaino
Reolua Guaino

12-710

MacC...

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

JOHN CAPRA, a/k/a "Johnny Hooks,"
LEOLUCA GUARINO, and
STEVEN DELLACAVA,
a/k/a "Beansie,"

Defendants.

DELR 61373
S. D. N. Y.
NOLLE PROSEQUI

76 Cr. 324

R.O.

1. The filing of this Nolle Prosequi will dispose of this case as to the defendants JOHN CAPRA, a/k/a "Johnny Hooks," LEOLUCA GUARINO, and STEVEN DELLACAVA, a/k/a "Beansie."

2. On April 21, 1976, Indictment 76 Cr. 324, filed April 5, 1976, was unsealed. That indictment charged thirty-three defendants in forty counts with conspiracy to violate the narcotics laws and with substantive violations of those laws. The defendants JOHN CAPRA, a/k/a "Johnny Hooks," LEOLUCA GUARINO, and STEVEN DELLACAVA, a/k/a "Beansie," were charged in Count One with conspiracy to distribute heroin and cocaine in large quantities, and in Counts Thirteen and Fourteen with actual distribution of a total of four and one-half kilograms of heroin.

3. On April 29, 1976, the defendants CAPRA, GUARINO, and DELLACAVA entered pleas of not guilty to Indictment 76 Cr. 324.

4. On June 24, 1976, the motions for severance made by defendants CAPRA, GUARINO, and DELLAVACA were granted. On August 10, 1976, trial began against twenty-two of the original thirty-three defendants, nine of the remainder having pleaded guilty, been severed, or become fugitive, and an order of Nolle Prosequi having been entered as to two.

On November 12, 1976, the jury returned a verdict of guilty as to seventeen defendants, not guilty as to four defendants, and declared itself unable to agree on a verdict as to one defendant on all counts and another defendant on three counts. As to those defendants a mistrial was declared November 12, 1976, and they are awaiting retrial.

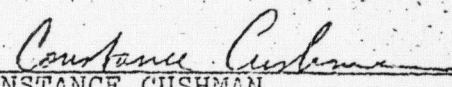
5. The defendants JOHN CAPRA, LEOLUCA GUARINO, and STEVEN DELLACAVA are presently in custody, serving terms of imprisonment of fourteen years each, and DELLACAVA, twelve years, after their convictions, after a five week jury trial, on charges of violating the Federal narcotics laws. The Indictment in that case, S73 Cr. 460, charged both conspiracy and substantive violations of the narcotics laws; while the conspiracy convictions were reversed, their convictions on the substantive counts in that Indictment were affirmed by the United States Court of Appeals for the Second Circuit.

6. Certain wiretap evidence against the co-defendants in 76 Cr. 324 who remain to be tried is inadmissible against the defendants CAPRA, GUARINO and DELLACAVA, and would be prejudicial if admitted in a joint trial even with limiting instructions. Consequently, severance and a third trial may be required to permit the Government to introduce this evidence against the codefendants. Further, even were these defendants convicted of conspiracy, the sentencing judge in 76 Cr. 324 would be required to determine whether the conspiracy here charged is distinct from that charged in Indictment S73 Cr. 460, before imposing any additional term of imprisonment beyond that which CAPRA, GUARINO and DELLACAVA are already serving.

7. Accordingly, in view of the substantial drain upon the resources of the Court and Government required to try the defendants CAPRA, GUARINO and DELLACAVA, and the lengthy sentences they are now serving, further prosecution of the defendants CAPRA, GUARINO, and DELLACAVA is not warranted.

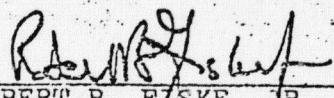
8. In view of the foregoing facts, I recommend that an order of Nolle Prosequi be filed as to the defendants JOHN CAPRA, a/k/a "Johnny Hooks," LEOLUCA GUARINO and STEVEN DELLACAVA, a/k/a "Beansie" on Indictment 76 Cr. 324.

Dated: New York, New York
December 21, 1976


CONSTANCE CUSHMAN
Assistant United States Attorney

Upon the foregoing recommendation, I hereby direct, with leave of the Court, that a nolle prosequi be filed with respect to defendants, JOHN CAPRA, a/k/a "Johnny Hooks," LEOLUCA GUARINO, and STEVEN DELLACAVA, a/k/a "Beansie," on Indictment 76 Cr. 324.

Dated: New York, New York
December 21, 1976


ROBERT B. FISKE, JR.
United States Attorney

CF

please take notice that a

the within is a copy, was this day
served in the within entitled action.
Office of the Clerk of this Court.

d. N. Y., _____, 19 ____

Yours, etc.,

United States Attorney
Attorney for _____

Attorney for _____

Take notice that the within
presented for settlement and sig-
of the Honorable _____
United States District Judge, at the office of
Room 601, United States Court-
House Square, Borough of Manhat-
tan, New York, on the _____ day of
____, 19 ____, at 10:30 o'clock in the
noon or as soon thereafter as coun-
sel heard.

d. N. Y., _____, 19 ____

Yours, etc.,

United States Attorney
Attorney for _____

Attorney for _____

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

JOHN CAPRA, a/k/a "Johnny Hooks,"
LEOLUCA GUARINO, and
STEVEN DELLACAVA,
a/k/a "Beansie,"

Defendants.

NOLLE PROSEQUI

76 Cr. 324

ROBERT B. ELSKE, JR.
TEL. 241-2111 United States Attorney
791-0055 Attorney for USA

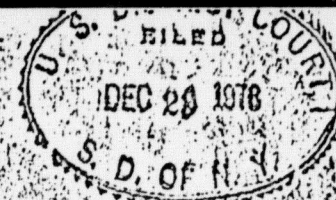
Due service of a copy of the within is here
by admitted.

New York, _____, 19 ____

Attorney for

To

Attorney for



Leave to file the within
Nolle Prosequi is granted.

[Signature]
U.S.D.J.
12/28/76

CC: ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-Y-

76 Cr. 324 (V.B.)

JOHN CAPRA,
LEOLUCA GUARINO,
and STEVEN DELLACAVA.

Defendants.

GOVERNMENT'S MEMORANDUM OF LAW

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America.

CONSTANCE CUSHMAN
Assistant United States Attorney

- Of Counsel -

CC: ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA.

-v-

76 Cr. 324 (V.B.)

JOHN CAPRA,
LEOLUCA GUARINO,
and STEVEN DELLACAVA.

Defendants.

GOVERNMENT'S MEMORANDUM OF LAW

This memorandum is submitted together with the Government's proposed Order of Nolle Prosequi, in response to the Court's request for a response from the Government to any motions by the defendants Capra, Guarino and Dellacava which remain pending at the time of the filing of this proposed Order.

The pending motions fall into several categories. First are those made prior to the severance of Capra, Guarino and Dellacava on June 24, 1976. These include their oft-repeated requests for severance and continuance, on the grounds of prejudice by joinder with their codefendants, inability to retain counsel of their choice, and lack of time to prepare their defense; motions for discovery, bills of particulars, disclosure of Brady and other material, and suppression of a variety of evidence; they also include motions to dismiss the instant indictment.

CC:kco

76 Cr. 324 on grounds of double jeopardy and lack of timely prosecution, as well as on the ground of a challenge to the Grand Jury array.

The second group of motions was made after their severance, during the trial of United States v. Juan Antonio Alvarez, et al. These include efforts to suppress evidence as it was introduced in that trial, and challenges to Jack Brown, the major witness, made as impeaching material emerged during his testimony.

The third group, consisting of motions made after the conclusion of that trial, involve a motion to dismiss the indictment on the ground that Guarino was improperly returned to Atlanta Penitentiary during the course of the Alvarez trial, and a motion to correct the courts' docket sheet. The Government does not oppose the motion to correct the court's docket sheet.

With respect to the first group of motions, the Government filed its general response to all pretrial discovery and severance motions on or about May 28, 1976. Oral argument, with the defendants Capra, Guarino and Dellacava present, was heard on June 4, 1976. On June 24, 1976, those three defendants were severed for later trial.

The Government submits that consideration

CC:kco of motions relating to discovery and other trial or evidentiary matters is unnecessary since no trial is contemplated.

The motion to dismiss with prejudice based on the challenge to the Grand Jury array is frivolous. See, United States v. Kahn, 472 F.2d 272, 286 (2d Cir. 1973); United States v. Deardorff, 343 F. Supp. 1033, 1039 (S.D.N.Y. 1941); United States v. Wolfson, 405 F.2d 779, 784 (2nd Cir. 1968).

Guarino also moves to dismiss the indictment on the ground of double jeopardy, arguing that the conspiracy charged in Indictment 76 Cr. 324 is the same as the conspiracy charged in Indictment S. 73 Cr. 460. But since Guarino's conviction of conspiracy on Indictment S. 73 Cr. 460 was reversed in contemplation of retrial, see United States v. Capra, 501 F.2d 267 (2d Cir. 1974) even if the present conspiracy charged is the same as the conspiracy charged in the 1973 indictment trial on that charge would not be barred by double jeopardy. Moreover, the substantive counts in indictment 76 Cr. 324 are unrelated to charges in the previous indictment.

By motion dated June 7, 1976, at page 13, Guarino moves for an order dismissing the indictment "based on the failure to timely prosecute." Neither the motion nor the supporting memorandum, received by this office on June 23, 1976, articulates the basis for this claim.

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The indictment in this case was unsealed on April 21, 1976. The Government announced ready and the case was set down for trial for July 19, 1976, and later adjourned to August 10 pending resolution of motions. Guarino moved for a severance which was granted. Guarino has failed to suggest in what fashion the Government failed to prosecute him timely. Moreover, since indictment 76 Cr. 324 was based upon the testimony in the Grand Jury of Jack Brown and Michael Parker, individuals whose cooperation with the Government began in April and December, 1975, respectively, trial of this indictment could in no way be viewed as a retrial governed by the provisions of 18 U.S.C. § 3161(e).

The second group of motions, made during the first trial in 76 Cr. 324, is without merit. Since these defendants were not present at that trial, they had no standing to contest any evidence there adduced, or in any way to interfere with the Court's conduct of that trial.

Finally, Guarino seeks dismissal of the Indictment with prejudice because the defendant was

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returned to Atlanta Penitentiary to await his trial.
This motion is without merit.

When the defendant Guarino was indicted he was in custody at Atlanta Penitentiary serving a term of imprisonment for violation of the Federal narcotics laws. He was in the custody of the Attorney General of the United States, who has authority and discretion, pursuant to 18 U.S.C. §§4001 et. seq., to determine their place of incarceration. He was brought to Court to answer the charges against him; indeed pursuant to 18 U.S.C. §3012, no writ is necessary to order his production in Court. To facilitate his transfer into this district, however, the Assistant United States Attorney applied for, and the Court issued a writ of habeas corpus ad prosequendum. He was brought to court, pleaded not guilty, made his motions, was severed, and since his presence in this district to appear in court for trial was no longer immediately required, he was returned to Atlanta Penitentiary. All the while, of course, his rights to a speedy trial continued to be protected by the provisions of the Speedy Trial Act, 18 U.S.C. §3161 et. seq.

He now moves to dismiss the indictment because

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he was returned to Atlanta Penitentiary, and the language of the writ stated that he should be there returned "after he shall have been discharged or convicted on this Indictment." He relies on United States v. Mauro, 414 F. Supp. 358 (EDNY 1976), the Interstate Agreement on Detainers, "Equal Protection," and "^{due} process."

The Interstate Agreement on Detainers (IAD) addresses the problems of securing, for speedy trial in one state, persons in custody in another. It defines "State" to include the 50 states of the United States of America, and the United States of America itself. (Only 39 of the fifty states have adopted IAD and become "party states.") By its terms, it provides that an inmate in custody in one state against whom charges pending in another have been lodged as a detainer, can demand to be brought to answer those charges. It also provides a statutory penalty, dismissal of the Indictment with prejudice, should he, having been brought to the charging state, be returned to his original state of custody prior to the disposition of those charges. As a matter of law, the IAD does not apply within a "state," including the United States of America. This statute has nothing whatever to do with the power of this Court under 18 U.S.C. §3012 to compel a prisoner,

CC:keo

in federal custody, to appear in court, and to order his return to custody; nor with the power of the Attorney General to place persons serving terms of imprisonment, in those institutions he deems appropriate.

This was a prisoner, in Federal custody, being brought to another Federal district to appear in court, and when his presence in court was no longer required, being returned to custody in an appropriate institution.* The writ, merely the instrument by which he was produced in this district, cannot be held to dictate his remaining here until after trial.

Defendant Guarino attempts to invoke the concepts of Equal Protection and due process, to support his application of the IAD to his situation. He does so without the slightest showing of prejudice, "invidious classification," or of deprivation of a constitutionally guaranteed right.

His sole claim of prejudice is that he has been hampered in his preparation for trial, by not being present in this district for the first trial. Since

* The M. C. C. is not a high security institution, and the defendant is a high-risk prisoner.

CC:kco

the Government does not contemplate trying him on these charges at this time, this claim is, at most, ^{hypothetical} ~~hypothetical~~.

Moreover, there were sound reasons for ordering Guarino's return to Atlanta. He had moved for a severance and his motion had been granted. Since the trial of the remaining defendants was expected to last approximately three months, the Government was not required to maintain a high risk defendant at the Metropolitan Correctional Center, an institution which in its short history has already had at least one successful escape, and several nearly successful attempts. Since Guarino sought, and won, a lengthy delay in his trial, he can hardly complain of unequal or unfair treatment, particularly when his return to Atlanta was mandated by his own high risk status.

Finally, the statutory scheme provides that federal prisoners brought to state institutions and state prisoners brought to federal institutions must be tried before being discharged or the Government faces the risk of dismissal. This statutory scheme and classification is justified by traditional principles of comity, which ~~do~~ not apply to Guarino, a federal prisoner, brought to answer charges in federal court. Since any distinctions

CC:keo

in treatment dictated by the statute is reasonable,
Guarino's equal protection argument must fail.

Wherefore, for the reasons given above,
Guarino's motions should be denied, except as
consented to.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

CONSTANCE CUSHMAN
Assistant United States Attorney

- Of Counsel -

GF:MM

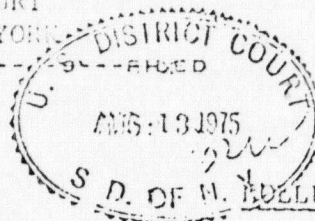
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JACK BROWN,

Defendant.



73 Cr. 460 (MEF)

-----x

1. The filing of this Nolle Prosequi as to the defendant JACK BROWN will dispose of the case as to him.

2. On May 16, 1973 Indictment 73 Cr. 460 was filed, in six counts, charging the defendants, John Capra, Leoluca Guarino, Steven Dellacava, Robert Jermain, George Harris, Alan Morris, John Caruso, Earl Simms, Joseph Messina, Carmelo Garcia and JACK BROWN with multiple violations of the federal narcotics laws in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846 and Title 26, United States Code, Sections 4705(a) and 7237(b).

3. Capra, Guarino, Dellacava, Jermain, Harris and Morris were convicted after a trial by jury on all counts in which they were named on November 22, 1973. Their convictions were upheld on appeal and certiorari has been denied. 501 F.2d 267 (2d Cir. 1974), cert. denied 43 U.S. L.W. 3515 (March 18, 1975). Simms entered a guilty plea on October 17, 1973 to a superseding information (73 Cr. 969). A nolle prosequi was filed as to Messina and Garcia. Caruso is a fugitive. BROWN was not apprehended until after completion of the trial, but there is no evidence that he was

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aware of the Indictment and bench warrant issued thereunder for his arrest.

4. BROWN was named only in Count One of Indictment 73 Cr. 460, the conspiracy count. The judgments of conviction on Count One against Capra, Guarino and Dellacava were reversed by the Court of Appeals because of the admission into evidence of illegal electronic interceptions of their conversations and testimony regarding resulting police surveillance of their activities. The evidence against BROWN consists entirely of conversations intercepted from this same wiretap and police surveillance testimony resulting therefrom.

6. Under the circumstances it is no longer possible to proceed with this prosecution.

In view of the foregoing, I recommend that an order of Nolle Prosequi be filed as to the defendant JACK BROWN on Indictment 73 Cr. 460.

Dated: New York, New York

August 11, 1975.

Gerald A. Feeffer
GERALD A. FEEFFER
Assistant United States Attorney

Upon the foregoing recommendation, I hereby direct leave of the Court that an order of Nolle Prosequi be entered as to the defendant JACK BROWN on Indictment 73 Cr. 460.

Dated: New York, New York

August 11, 1975.

Paul J. Cerran
PAUL J. CERRAN
United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,
DEFENDANT.

76 Cr. 0324 (VLD)

NOTICE OF MOTION TO VACATE THE
COURT'S ORDER GRANTING THE PRO-
SECUTOR'S EX PARTE APPLICATION
FOR NOLLE PROSECUTION, AND FOR THE
COURT TO ENTER AN ORDER DISMISS-
ING THE INSTANT INDICTMENT WITH
PREJUDICE.

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of LEOLUCA GUARINO, the defendant pro se, sworn to on January 21, 1977, and upon all the other papers and proceedings had in this case, the undersigned will move this Court on the next motion day occurring no more than five (5) days after the receipt and filing of this Notice and annexed affidavit for an Order granting the defendant his application for a vacature of this Court's Order wherein it granted the prosecutor's ex parte application for nolle prosequi (filed twenty-one (21) days after the defendant moved for a dismissal with prejudice, for failure to afford him a speedy trial); and for the Court to enter an order dismissing the instant indictment, No. 76Cr0324 (VLD), "with prejudice". And for such other and further relief as to this Court may seem just and proper as well as consistent with due process of law.

DATED: January 21, 1977.

Yours etc.,

Leoluca Guarino D-81

Leoluca Guarino
Defendant pro se
PO Box PEB 775241
Atlanta, Georgia 30315

To: United States Attorney's Office
Southern District Of New York
U.S. Courthouse—Foley Square
New York, New York State 10007

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

76 Cr. 0324 (VLB)

AFFIDAVIT

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says:
that he is the defendant in the above captioned matter, and that he makes the
instant affidavit in support of his motion based on the following:

1. That on December 2, 1976, the defendant-affiant herein
submitted a pro se motion seeking dismissal of the instant indictment, with
prejudice, due to the Government's failure to try him before returning him
to the Atlanta Federal Penitentiary. (See United States v. Mauro, 20 CrL
2146, 2147 (2nd Cir. 1976)). And, also, because of the Government's failure
to afford the defendant-affiant a prompt and speedy trial. (See 18 U.S.C.
Section 3161, et seq.).

2. That on December 21, 1976, AUSA, Constance Cushman, with
leave of this Court, filed a nolle prosequi as to the defendant-affiant,
Leoluca Guarino, and co-defendants John Capra and Steven Dellacava as to
indictment 76 Cr. 0324. The nolle prosequi was filed nineteen (19) days
after the defendant-affiant submitted his motion for dismissal with pre-
judice.

3. That notwithstanding that the defendant-affiant has been
proceeding pro se (see motion to correct docket entries of December 7, 1976)
he has but recently, viz., on January 17, 1977, received a copy of the nolle
prosequi submitted by the Government. Accordingly, he now registers his
objection to the granting of the nolle prosequi.

4. That, primarily, the defendant-affiant objects to the nolle prosequi because it is calculated to abort his constitutional rights to due process of law as envisioned in The Speedy Trial Act of 1974, as articulated in the legislative history thereto: "Pursuant to questions that arose during discussion of the dismissal sanction, several points with respect to H.R. 17409 deserve clarification: first, as already indicated above, dismissal is mandatory but not automatic, since the defendant is expressly required under Section 3162(a)(2) to move for dismissal if not brought to trial within the prescribed time; second, it should be clear that the Attorney for the Government is free to contest the granting of a motion to dismiss on the basis of error by noting his exceptions and taking appeal in the proper manner;..." (U.S. Code Congressional and Administrative News, P.L. 93-619, p. 7431, emphasis in original).

5. That the prescribed time upon which the Government could have moved to try the defendant-affiant was 120 days from the day of severance. (See 18 U.S.C., Section 3161(g)). This the Government did not do. Severance having occurred on June 24, 1976.

6. That the defendant-affiant seriously questions the good faith of the Government. This is so because the nolle prosequi was filed exactly fifty seven (57) days after the statutory limit of 120 days for trial, and exactly nineteen (19) days after the defendant-affiant moved for a dismissal with prejudice. Additionally, past experience with Government Attorney's has taught the defendant-affiant that they, AUSA's, are not beyond resorting to fraud, deceit, chicanery, and other reprehensible tactics under the protective cloak of their office. For example: when the defendant-affiant initially appeared for arraignment upon the indictment, on April 29, 1976, he refused to enter any plea other than that of "double jeopardy". This plea of former jeopardy occasioned a heated colloquy between the court, Judge MacMahon, and the defendant-affiant who was proceeding pro se, and culminated with the court refusing to entertain the plea of double jeopardy and, instead, it substituted a plea of ^{not} guilty on its own motion.

7. That as far back as May 13, 1976, the defendant-affiant filed a motion outlining his double jeopardy claim; the enhanced punishment aspects of a trial on the conspiracy count of indictment No. 76 Cr. 0324;

as well as a Bertolotti issue. This motion was never opposed by the Government nor was it ever ruled upon by the Court. (But see Motion To Correct The Docket Entries of December 7, 1976, p. 3, par. (b)).

8. That reasons for the nolle prosequi, as setforth by the Government, are as follows: "Certain wiretap evidence against the co-defendants in 76 Cr. 324 who remain to be tried is inadmissible against the defendants CAPRA, GUARINO and BELLACAVA, and would be prejudicial if admitted in a joint trial even with limiting instructions. Consequently, severance and a third trial may be required to permit the Government to introduce this evidence against the codefendants. Further, even were these defendants convicted of conspiracy, the sentencing judge in 76 Cr. 324 would be required to determine whether the conspiracy here charged is distinct from that charged in Indictment S73 Cr. 460, before imposing any additional term of imprisonment beyond that which CAPRA, GUARINO and BELLACAVA are already serving." (Nolle Prosequi, p. 2, par. 6).

9. That the nolle prosequi does not speak in terms of the two substantive counts, viz., Counts Thirteen and Fourteen, but only refers to the conspiracy count, and its double jeopardy ramifications. This belated and seemingly noble admission, by the Government, is seriously questioned by the defendant-affiant inasmuch as it was made nineteen (19) days after the defendant-affiant moved for his dismissal under the Speedy Trial Act of 1974, and not before. Under these circumstances it is not at all difficult to conclude that the nolle prosequi was sought for the sole purpose of aborting the defendant-affiant's rights.

10. That since the nolle prosequi addresses itself solely to the conspiracy count--the same conspiracy for which the defendant-affiant was previously tried and convicted for, and which was subsequently reversed because of illegal wiretaps (United States V. Capra, 501 F.2d 267 (2nd Cir. (1974))--the defendant-affiant respectfully requests that this Court reconsider its prior position in light of the Congressional intent of the Speedy Trial Act, and thus resolve the issue as to the propriety of the Government holding open the two substantive counts of 76 Cr. 0324 in complete defiance of the defendant-affiant's invocation of a proper remedy.

11. That the nolle prosequi has the effect of precluding the defendant-affiant from participating in rehabilitative programs because the

Institution views it as a pending indictment. The defendant-affiant was originally compelled to withdraw from a college program when he was removed from the Atlanta Penitentiary to answer to Indictment No. 76 Cr. 0324, and he is now precluded from re-entering said college program because of the mental anguish and anxiety of not knowing when the Government prosecutor will capriciously and arbitrarily decide to "get Leoluca Guarino". Last, but certainly not least, the Government's position will, collectively, serve as a roadblock that will effectively negate the defendant-affiant's application for parole by precluding him from meaningful parole consideration. (But see, e.g., Billiteri V. U.S. Board of Parole, ____ F.2d ____, 20 CrL 2241 (2nd Cir. 1976)).

WHEREFORE, under the facts and the law, the defendant-affiant respectfully moves this Honorable Court for an Order granting the relief herein requested, i.e., vacature of the nolle prosequi and for an Order dismissing the instant indictment with prejudice for failure to comply with the speedy trial requirements of 18 U.S.C., Section 3161(g).

Yours etc.,

Leoluca Guarino 78281

Leoluca Guarino #78281
Defendant-Affiant pro se

Sworn to before me this
21st day of January, 1977.

Charles C. Mott

Parole Officer Authorized by the Board of
July 7, 1955 to Administer Oaths (28 U.S.C. 553)
(1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

76 Cr. 0324 (VLB)

LEOLUCA GUARINO, et al.,

DEFENDANT.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says: that on this 21st day of January, 1977, he served a copy of the instant Motion and Affidavit upon the United States Attorney for the Southern District of New York by placing same in a sealed envelope, in the PMB Box, for purpose of being forwarded to the said United States Attorney via the United States Mail, all of which should constitute sufficient proof of service.

Yours etc.,

Leoluca Guarino 78281

Leoluca Guarino #78281

Sworn to before me this
21st day of January, 1977.

Charles C. M. [Signature]

Notary Public
State of New York
[Signature]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

76 Cr. 0324 (VLB)

LEOLUCA GUARINO, et al.,

DEFENDANT.

DEFENDANT'S PRO SE MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO VACATE
ORDER GRANTING THE GOVERNMENT'S EX
PARTE APPLICATION FOR NOLLE PROSEQUI,
AND FOR THE DISMISSAL OF THE INSTANT
INDICTMENT WITH PREJUDICE

Statement.

The defendant LEOLUCA GUARINO submitted a motion seeking the vacatur of this Court's order granting the Government a nolle prosequi to Indictment No. 76 Cr. 0324, with an accompanying affidavit thereto, on January 21, 1977. Later that evening he received a copy of the Government's memorandum of law which allegedly accompanied its application for a nolle prosequi. Said memorandum of law contains many factual misrepresentations to this Court that are clearly calculated to deprive the defendant herein of any corrective process within this judicial forum. Consequently, the instant memorandum is submitted with an eye towards bringing the true issues into their proper perspective.

The Issues As Originally Presented.

The issues germane to the instant memorandum evolve from the defendant's motion of December 2, 1976, which sought a dismissal of the indictment, with prejudice, because of the failure to prosecute the defendant before returning him to the Atlanta Penitentiary in violation of the writ of habeas corpus ad prosequendum; and on the further grounds that the defendant was denied his right to a prompt and speedy trial.

The Defendant's Issues As Viewed By The Government.

The Government has distorted the defendant's claim, as advanced in the motion of December 2, 1976, viz., the first claim, to make it appear as if the defendant is invoking the protection of the Interstate Agreement on Detainers Act. This is a deliberate misrepresentation and only underscores the defendant's accusations that the Government will not hesitate to resort to fraud, deceit, chicanery, and/or other underhanded tactics that will serve their purpose. (See Affidavit of January 21, 1977, at p. 2, par.6). The Government makes no attempt to dispute the defendant's claim that he was denied a speedy trial instead it advances its reasons for justifying the defendant's removal from the MCC. Reasons that fall far short of truth.

Argument.

The defendant's motion of December 2, 1976, sought a dismissal of the instant indictment, with prejudice, based on the

rationale of the Court of Appeals in United States V. Mauro, 20 CrL 2146, 2147 (2nd Cir. 1976), wherein it concluded that a writ of habeas corpus ad prosequendum entitles a defendant to be tried "before his return" to prison. (See Motion Of December 2, 1976, at p. 3, par. 2). Admittedly, Mauro invoked the protection of the Interstate Agreement on Detainers Act; however, unlike Mauro the defendant sought the protection of the Fifth Amendment guarantee to due process of law, as well as equal protection of the laws which prohibits the Federal Government from doing what the states are enjoined from doing. (See e.g., Bolling V. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), see also Motion of December 2, 1976, at p. 4., par. 1). In this light the reliance on Mauro is apropos.

The Government prosecutor attempts to becloud the crystal clear issue above posited by advancing specious reasons as to what this Court could have done in exercising its jurisdiction to compel the defendant to appear in Court. To this end it cites 18 U.S.C. Sec. 3012, as well as 18 U.S.C. Sec. 4001, which gives the Attorney General the authority to transfer a prisoner to any suitable place for confinement.

Be that as it may, the issue herein is not whether this Court has the power to compel the production of the defendant to answer to an outstanding indictment without the issuance of a writ of habeas corpus ad prosequendum via 18 U.S.C. Sec. 3012. Concedely, the Court has this power; however, that power was not invoked nor exercised in the case at bar. Equally significant is the fact that

the defendant was not transferred to the MCC via the Attorney General's authority under 18 U.S.C. Sec. 4001. What is germane is the fact that the defendant was removed from the Atlanta Federal Penitentiary pursuant to a writ of habeas corpus ad prosequendum to answer to an outstanding indictment in the Southern District of New York, and that the terms of the writ demanded his presence until the defendant is "discharged or convicted and sentenced on said indictment". (See Exhibit A, appended to the Motion of December 2, 1976). These terms were wilfully and deliberately ignored by the Government when the defendant was ordered returned to the Atlanta Penitentiary "(a)s per AUSA Beller".

Parenthetically, it should be noted that the devious machinations of the Government now fall within the proscriptions articulated in Mauro, supra, and that the petitioner-defendant's motion to dismiss the indictment with prejudice should have been granted rather than aborted by the prosecutor's bad faith application for a nolle prosequi.

The Government now attempts to justify its blunder by labeling the defendant "a high-risk prisoner" insofar as "security" is concerned, making no mention of the fact that the MCC has a high security risk section, as justification for removing him from MCC and thus violating the terms of the writ. This newly adopted position falls with the premise and is contrived out of whole gossamer cloth, it also crystallizes the Government's proclivity to resort to fraud, deceit, and chicanery to attain its ends.

It is respectfully submitted that the Court take judicial notice of the fact that when the defendant was originally convicted, upon the sentence that he is presently serving on Indictment S73 Cr. 460 (IF), he was permitted to return to his family, by the trial judge, in order to spend thanksgiving day with his loved ones over the vehement protestations of the Government. Notwithstanding that the Daily News reported that the defendant faced a possible term of imprisonment that would exceed 180 years the trial court did not deem him to be a security risk and, indeed, the defendant justified the trial court's decision as well as its humane act. Moreover, it should also be noted that the defendant was placed in the medium custody category of prisoners by the Atlanta Penitentiary authorities upon his arrival and that he presently lives in honor quarters--quarters that are not available to security risks--and has lived in said honor quarters for the past two years. Consequently, the defendant objects to the prosecutor's inaccurate and irresponsible characterization of his status. This is particularly insidious when we consider that the Justice Department is the same body under which both the Assistant United States Attorney's and the Parole Board function, and that consistent with Parole Board policy it is their custom to solicit recommendations from the United States Attorney's office when considering an inmate for possible parole. In effect the prosecutor has now reclassified the defendant, without notice or hearing, to a more prejudicial category in an effort to deprive him of whatever redress this Court may be inclined to exercise.

Significantly, the Government does not touch upon the second issue raised by the defendant in his motion of December 2, 1976, i.e., the Government's failure to afford him a prompt and speedy trial. An issue that pursuant to the Speedy Trial Act of 1974 requires the dismissal of the instant indictment with prejudice--and not the nolle prosequi of one count.

The Speedy Trial Act of 1974 envisioned a process whereby a gradual implementation of its mandate would be adopted by the courts and prosecutors. To this end 18 U.S.C. Sec. 3161(g) directs as follows:

" Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred-and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days,...." (Emphasis added)

In the case at bar the defendant was severed, together with two other co-defendants, from the main body of alleged co-conspirators on June 24, 1976. On July 1, 1976, the one hundred and twenty day implementation clause to the Speedy Trial Act went into effect, and on December 2, 1976, the defendant moved to dismiss the indictment with prejudice for failure to afford him a speedy trial, albeit not with the technical precision of an accomplished and polished attorney who would have cited chapter and verse. Happily, this strict adherence to pleadings is not required of pro se litigants. (See e.g., Haines V. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972)).

The legislative history of the Speedy Trial Act has this to

say:

"Dismissal with prejudice

In the event that the time limits of the bill, subject to the various exclusions, are not met, the court on motion of the defendant may dismiss the complaint, information or indictment against the individual. This sanction applies to both the period between arrest and indictment and between indictment and trial. The effect of dismissal would be to bar any future prosecution against the defendant for charges arising out of the same conduct. Dismissal with prejudice would apply to those offenses which were known or reasonably should have been known at the time of dismissal. A defendant must move to dismiss the case prior to trial, entry of a plea of guilty or nolo contendere, or he waives the right of dismissal with prejudice on grounds that the requirements of this legislation were not met. (Section 3162(a))

"Sanctions are also provided for attorneys, either for the defense or the Government, who intentionally delay the proceedings. The penalties include a reduction in compensation or a fine, or suspension from practice before the court for up to 90 days." (U.S. Code Congressional and Administrative News, P.L. 93-619, p. 7416)

The sanction proviso merely underscores the seriousness that the Congress viewed any attempt to tamper with an accused's right to a prompt and speedy trial, especially in a situation where, as in the case at bar, the defendant moves for a dismissal with prejudice because of the Government's failure to timely prosecute, but through Government machinations the defendants' invocation of a proper remedy is aborted through a nolle prosequi calculated to salvage their case for future prosecution. This insidious Government manipulation flies in the face of the Congressional intent behind the defendant's right to move for a dismissal with prejudice.

The Government does not claim any excludable time period exceeding the 120 day statutory demand of 18 U.S.C. Section 3161(g), nor can they. And notwithstanding that the defendant did seek a continuance by written motion submitted on May 13, 1976, it was never officially ruled upon and numerous oral requests were summarily denied in open court, the last having occurred on June 21, 1976. Again, recourse to the legislative history reflecting the intent of Congress may prove helpful:

"Although the Committee believes that under the Senate version it would be unlikely that a great many cases would be reprosecuted, the potential for such occurrences exists. In addition, two witnesses--Mr. Charles Morgan, Washington Director of the American Civil Liberties Union, and Mr. Barris--added that as they read the decision, the Supreme Court's holding in Strunk v. United States, 412 U.S. 434 (1973), requires dismissal as the only appropriate remedy in cases where the right to speedy trial is abridged, despite the extreme nature of the remedy. With respect to the propriety of requiring a permanent bar to future prosecution, the Committee adopts the position of the American Bar Association as stated by the Advisory Committee on their Commentary on Standards Relating To Speedy Trial:

'The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay.'
(Standards, Approved Draft, 1968, pp. 40-41.)"
(Ibid. p. 7430)

Hence, it is clear that under the totality of circumstances advanced in the defendant's motion and affidavit, as well as for the reasons herein set forth, the motion to vacate this Court's order granting the prosecutor's ex parte application for a nolle prosequi should be granted and an order entered dismissing the indictment with prejudice.

It should also be noted that the Government's memorandum has broken the defendant's motions into three categories, i.e., prior to severance; after severance, but during the course of the trial as to the alleged co-defendants; and motions made after the conclusion of that trial. Interestingly enough, the first group of motions contained one which advanced an argument detailing the defendant's theory of being placed in double jeopardy--the very grounds now adopted by the prosecutor as reasons justifying the grant of the nolle prosequi.

The second group of motions deal with substantial issues of law that are clearly of constitutional dimensions. (See motion dated August 17, 1976). The deliberate introduction of illegal wiretaps by the Assistant United States Attorney, in direct violation of the Second Circuit's order in United States V. Capra (501 F.2d 267 (1974)), is only one of the many serious issues raised in that motion.

The Government now submits a dual position in their nolle prosequi, viz., that prejudice would flow from a joint trial, and the distinct possibility of double jeopardy as to the conspiracy. Each of these positions were originally argued by the defendant via written and oral motions, and on each and every oral presentation the Government

vehemently opposed. Now we find the Government adopting a stand inapposite from that originally taken--and only after the defendant moved for a dismissal with prejudice for failure to afford him a speedy trial. Under these circumstances it is not at all difficult to conclude that the Government is merely attempting to salvage their case for a future prosecution while ignoring the defendant's due process rights. This flagrant disregard of basic standards of decency characterizes the Government's attitude against the defendant from the very incipency of the proceedings against him. In this regard it is worthy of note that the Assistant United States Attorney responsible for obtaining the indictment against the defendant (Mr. Beller) is the same prosecuting attorney who assisted in preparing the government brief on appeal, against the defendant, in 73 Cr. 460. The appeal in which the wiretaps were ruled illegal by the Second Circuit Court of Appeals and which motivated the Court to reverse the defendant's conspiracy conviction. This fact should highlight the reprehensible tactics that have now crystallized into yet another vindictive ploy--an empty and meaningless nolle prosequi--submitted 19 days after the defendant invoked his constitutional prerogative to due process of law. Review of the prosecutor's cavalier tactics in these cases, by the Court of Appeals, is imminent.

Recently, the Fifth Circuit Court of Appeals held that:

"If there is failure to abide by the plan, the trial judge to whom the case is assigned must impose what he considers to be the 'appropriate' sanction. In his discretion he

"may conclude as he did in this case, that
dismissal with prejudice is appropriate."
(United States v. Novelli, F.2d ,
Docket No. 75-3078, decided January 3, 1977)

Of course, in Novelli, the Fifth Circuit found that the district court's discretion was inherent in the District plan for prompt disposition of criminal cases for the Southern District of Texas. Here, the defendant invokes the protection of the Speedy Trial Act of 1974 which mandates dismissal with prejudice. (See defendant's Affidavit, p. 2, par. 4, citing the relevant portion of the Congressional intent behind P.L. 93-619).

Conclusion.

WHEREFORE, under the facts and the law this Court should grant the relief herein requested, i.e., vacate its order granting the Government permission to file a nolle prosequi and in its stead enter an order dismissing the instant indictment with prejudice.

Respectfully submitted,

Leoluca Guarino

Leoluca Guarino
Defendant pro se
PO Box PNB #78231
Atlanta, Georgia 30315

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

76 Cr. 0324 (VLB)

LEOLUCA GUARINO, et al.,

DEFENDANT.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF GEORGIA)

COUNTY OF FULTON)

SS:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says: that on this 26th day of January, 1977, he mailed a copy of the instant memorandum of law to the United States Attorney for the Southern District of New York, all of which should constitute sufficient proof of service.

Yours etc.,

Leoluca Guarino

Leoluca Guarino #78281

Sworn to before me this
26th day of January, 1977.

Charles C. Mott

Notary Officer: Authorized by the Act of
July 7, 1955 to administer Oaths (18 U.S.C.
A. 1. 1)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X	
In the Matter of	:
UNITED STATES OF AMERICA ex rel.	:
Leoluca Guarino, For a Writ of	:
Habeas Corpus on behalf of	:
Leoluca Guarino,	:
	:
Relator,	:
	:
-against-	:
	:
The Attorney General of the United States,	:
The United States Attorney for the Southern	:
District of New York, Daniel J. Beller,	:
United States Marshall for the Southern Dis-	:
trict of New York, and Warden of the Metro-	:
politan Correctional Center,	:
	:
Respondents.	:
-----X	

76 Cr. 324

ORDER TO SHOW CAUSE
WITH STAY

Upon reading the verified petition, and the affidavit of LEOLUCA GUARINO, sworn to on the 17th day of August, 1976, filed in this Court on , 1976, with a verified complaint under index number 76 Cr. 324, and upon said verified complaint, and good cause appearing therefore, it is hereby

ORDERED, that the respondents, The Attorney General of the United States, The United States Attorney for the Southern District of New York, Daniel J. Beller, United States Marshall for the Southern District of New York, and Warden of the Metropolitan Correctional Center, their agents, employees, and successors, show cause at this Court, to be held in Courtroom _____ of the Courthouse, Foley Square, New York, New York, on the _____ day of August, 1976, at 10:00 in the forenoon of said day, or as soon thereafter as said matter can be heard, if any they have, why a Writ of Habeas Corpus and a permanent injunction should not issue herein, as prayed for, and that said Respondents, their agents or successors, be and they are hereby restrained and enjoined from moving said LEOLUCA GUARINO out of the jurisdiction of the above-entitled Court pending the hearing and determination of said Petition, and until the further order of the above-entitled Court, and it further appearing to the Court that if the said LEOLUCA GUARINO is removed from the jurisdiction of this Court it will be difficult, if not impossible for him to consult with counsel, all of which would constitute irreparable harm to said LEOLUCA GUARINO, it is further

ORDERED, that the respondents, their agents, employees and servants be, and they are hereby directed to bring the said LEOLUCA GUARINO to Court to attend the entire remaining balance of the trial and all the proceedings derivative thereto pending the hearing and determination of the within Petition, and until the further order of the above entitled Court.

ORDERED, that respondents supply relator with copies of the minutes of all prior appearances in this case and copies of the daily minutes of the trial presently underway, free unrestricted access to witnesses and others. (I am presently only allowed three visits per week), since members of my family are assisting me in my preparation of this case, pro see - I need unrestricted visits. Woolfish, et al. v. Levy, 75 Civ. 6000.

SUFFICIENT, cause appearing, service hereof shall be sufficient if made by delivery to the United States Attorney for the Southern District of New York, with one (1) copy of this Order and the Petition with supporting papers, and by mailing copies of same to the named respondents, by certified mail, on or before but not later than August 18, 1976.

Dated: New York, New York
August 17, 1976

RICHARD B. OWEN
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

LEOLUCA GUARINO,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	76 Cr. 324
	:	
The Attorney General of the United States,	:	<u>COMPLAINT</u>
The United States Attorney for the	:	
Southern District of New York, Daniel J.	:	
Beller, United States Marshall for the	:	
Southern District of New York, and the	:	
Warden of the Metropolitan Correctional	:	
Center,	:	
Defendants.	:	

-----X

Plaintiff for his verified complaint herein, respectfully shows
to the Court:

1. This is an action for a declaratory judgment, an injunction and an order in the nature of mandamus. Plaintiff seeks a declaration that the defendant, the United States Attorney for the Southern District of New York, and most particularly, the Assistant United States Attorney, Daniel J. Beller, is using clearly tainted material in the present ongoing trial of the above captioned indictment, and he (Beller) has precluded and blocked Plaintiff from attending said trial, all of the foregoing being contrary to the interest of justice, contrary to Plaintiff's own interest, and contrary to the rights and interests of all the defendants named and now being tried upon said indictment. Plaintiff also seeks an injunction against Respondents' use of any material derived from Plaintiff's prior trial and consequent judgment on indictment # S 73 Cr. 460. Plaintiff also seeks a further injunction prohibiting the use of graphic material now displayed from a prominent position in the Courtroom during the trial process to date and which graphic material clearly labels Plaintiff as a major and key participant in the present trial of said indictment, his attendance and observation of which is being blocked by the Respondents herein. Plaintiff seeks a further injunction against any act or omission on the part of the Government which this Honorable Court feels might tend to irreparably prejudice the rights, privileges and interests of any defendant in this matter. Plaintiff also seeks an order in the nature of mandamus directing the Defendant (s) to bring the Plaintiff into the courtroom during this trial of the indictment, each and every day that the trial is in progress, and to cancel and rescind any outstanding order to prohibit such attendance.

2. This action arises under Indictment # 76 Cr. 324, and upon all

of the motions, hereby renewed, made by the Plaintiff in this matter, and most especially under this Court's Order of July 24th, 1976, granting this Plaintiff and two other defendants Severence, because, as the Court ruled in the Order

The motions require me to make a pretrial assessment in an area that has caused much discussion even after trial. I have studied the indictment and reviewed the grand jury minutes as requested by the parties. In the light of the various authorities that have been cited to me, I hereby sever defendants John Capra, Steven Dellacava and Leoluca Guarino collectively for later trial.

3. This Court has jurisdiction pursuant to the provisions of 28 U. S. C., Sections 1331, 1361, 1651, 2201, and 2202. There exists among the parties an actual controversy, justiciable in character, in respect to which Plaintiff requires a declaration of his rights by this Court, and an order directing the Defendants to perform the clear, mandatory duty imposed upon them by law, and an injunction to prevent the irreparable injury of Plaintiff's exclusion from present ongoing trial. A trial of Plaintiff's indictment: -A trial where Plaintiff is pro se: -A trial in which this Plaintiff is a prime focus of the Government's scenario in developing the case-in-chief: -A trial so fraught with serious and menacing prosecutorial cuteness that not only stigmatizes this Plaintiff and smacks of illegal pretrial publicity against this Defendant, but seriously undermines a meaningful and positive defense by the other defendants. The amount in controversy exceeds \$10,000.00 exclusive of interest and costs.

4. Plaintiff, Leoluca Guarino, is a citizen of the United States, presently detained at the Metropolitan Correctional Center, and was brought to MCC for the specific purpose of being tried on this indictment, and likewise, given an opportunity to prepare a proper and an intelligent defense.

5. All of the Defendants are sued in their official capacity only..

6. The defendant, Daniel J. Beller, is the Plaintiff's prosecutor in this matter, and it is he that issued and maintained ~~the~~ outstanding the Plaintiff's preclusion from this trial.

7. On or about the day of April, 1976, the Plaintiff was indicted along with 32 others for violations of Sections 173, 174, 812, 841(a)(1), and 84 (b) (1)(A), 951, 952, 960 of Title 21 U. S. C., for acts that occurred from January 1st, 1968.

8. Plaintiff is and has been continuously incarcerated from November , 197 until present, having been convicted for violations of Title 26 U. S. C. Sections 4705 (a) and 7237(b) and for violations of sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21 U. S. C., which violations occurred largely within the same time period and parameters of the violations charged in this instant indictment (76 Cr. 324).

9. Plaintiff, upon a verdict of guilty, was sentenced by the Honorable Marvin E. Frankel, and remanded to the custody of the United States Attorney General.

10. The United States Court of Appeals for the Second Circuit, reversed and remanded the conviction upon Count 1 of the indictment, which Count was the Conspiracy count, and affirmed the conviction upon Counts 2, 3, 4, 5, the substantive Counts of the indictment, S 73 Cr. 460.

11. The Circuit Court in reversing and remanding the conviction of Count 1, rendered a decision, and declared that certain evidence, namely tapes, and EVERYTHING derived from them (tapes) were and are irrevocably tainted. The Decision of the Circuit Court is attached hereto and made a part hereof, and marked, Exhibit 2. Davis v. Alaska, 415 U.S. 308, 1974.

12. On or about the day of June, 1976, this Plaintiff submitted to this Honorable Court myriad pretrial motions, and only the motion for severance was disposed of, therefore leaving all of the other motions made and filed in a state of pendency.

13. That the motions, aforesaid, revealed that the plaintiff is indigent, incarcerated, and is in all respects, representing himself in this matter. The motions and the proceeding already had herein further revealed strong allegations of double jeopardy and untimely prosecution, and the motions sought wide Discovery and lucid and specific Bill of Particulars, none of which has been granted to this Plaintiff

14. Under Rule 7F, of the Fed. R. of Crim. P., and under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, Plaintiff now seeks relief from this Court.

15. Plaintiff was not brought before Your Honor to attend and participate in all of the pretrial hearings and conferences had before Your Honor in the proceedings had upon this indictment, but plaintiff was present and active in most of the proceedings.

16. On the ____ day of May, 1976, it was stipulated and agreed upon by all of the defendants through their respective counsel that all motions and all rulings and all objections would be uniformly applied to all of the defendants, and this plaintiff was a party to that agreement by stipulation. Surely, as the Court urged all counsel to cooperate with the Court, as well as each other, precluding defendant from attending trial, from being available to other counsel, from witnessing events that can so materially affect Plaintiff's life, and of having all of the benefits that a non-incarcerated defendant would have, is a

serious and unremedial obstruction of Plaintiff's various constitutional rights and privileges. Moreover, considering the focus and thrust of the Government's position, every defendant here is prejudiced by Plaintiff's unavailability, perhaps irreparably so. In the interest of justice, and to prevent a failure of justice, if for no other compelling reason, and if for no further relief, Plaintiff's Petition to be brought into the courtroom to attend the trial must be granted.

17. Plaintiff is pro se, in effect, of counsel in this matter, and any further preclusion of his presence and attendance at this trial engenders real and justiciable violations of Plaintiff's right to due process; his privilege to testify or not testify; his right to face his accused; his right to have an open and public trial; his right ... to be a human being, to say nothing of the rights of the other defendants as they may be infected in this trial by uncontestable prejudicial overspill from acts that accrue largely to this Plaintiff.

18. Plaintiff recognizes that under Alderman v. United States, 394 U.S. 165 and subsequent authorities, that defendants who are not victims of illegal wiretaps may not suppress illegally seized evidence, and that this issue of standing is pretty well covered in Rule 41 (e) of the Federal Rules of Criminal Procedure. The Rule established in Brown v. United States, 411 U.S. 223, stating that a defendant whose own rights have not been violated may not move to suppress evidence seized in derogation of a codefendant's right is also considered by this Plaintiff as well as the rule gleaned from United States v. Capra, 501 F.2d 267, 272 (2d cir. 1974), cert denied, stating that a defendant charged with conspiracy to violate Narcotics Laws lacks possessory interest in heroin sold and delivered to codefendant. The purview of the foregoing cases does not serve here, in this matter because this Plaintiff, still is a defendant under this indictment, has standing, and vigorously objects to the use or intended use of any and all testimony, exhibits, and other things that might be considered evidentiary that is connected with, or derived from events, incidents, occurrences of this Plaintiff, such as testimony from prior trials and hearings in which Plaintiff had standing in; exhibits from such prior trials and hearings; tapes and surveillance movies that this Plaintiff has standing to object to, and does hereby (again) object to, and everything else that this Plaintiff would normally and properly object to. An order granting a defendant severance does not stop defendant's pleading, nor does such an order necessarily permit the unsevered defendants now on trial to be forced to defend against evidence that is largely concerned

against the severed defendant. To permit such evidence would be tantamount to a de-facto trial, an impermissible ad hoc barrage of mud slinging against defendants who are deliberately tied up hand and foot to prevent them from having an effective defense. Due process ^{Does} ~~should~~ dictate that if evidence has been adjudicated as tainted, then such evidence must not be used against anyone, especially, a defendant precluded from challenging it, not by operation of law, but by prosecutorial ploy. Plaintiff will leave to this Honorable Court to decide whether the Court should declare a mistrial, or as an alternative, strike everything that is tainted from the record and prohibit further use of any tainted evidence. The very least, Plaintiff hopes for ^{is} an in camera conference with all parties present, to decide the question of taint and prejudice as already occurred in this trial. Plaintiff, and all of the defendants herein, are consequently denied an in Court identification of this Plaintiff by the Government chief witness, and yet the Government has thus far been permitted to use illegal evidence to establish chief witnesses credibility. Plaintiff vigorously objects to any and all implications of Plaintiff's guilt as per the crimes charged in this indictment, and prays that this Court will issue an injunction preventing such uncontestable ~~illegal~~ ^{ILLEGAL GAINED EVIDENCE} ~~evidence~~ from being used.

19. Plaintiff asserts a United States v. Haze (95 S. Ct. 2133) situation in this case, because defendant, granted severance, is forced to remain silent, not being permitted to attend the trial, while the Government's chief witness villifies Plaintiff and so inextricably incriminates Plaintiff, and thereby causes innocent codefendants to be splashed by the ricochet effect of muddy testimony as to Plaintiff. (Call as witness, Daniel Beller, and asked if he planned this severance even before it was granted Plaintiff.)

20. That on or about June 24, 1976 there was nothing in Plaintiff's file to cause with legal sufficiency, the Plaintiff from being precluded from attending this trial.

21. That there is nothing legal sufficient to allow the premeditated use of previously adjudicated tainted material to be used at this on going trial.

22. Plaintiff seriously questions the propriety of Respondent's tactic to cause Plaintiff to be indicted and wonders whether or not Plaintiff's role in this indictment was largely a ploy for a methodology of using illegal and spurious evidence against the other defendants herein. The question here, that Your Honor will surely inquire of, was the Severance of this Plaintiff planned and anticipated in the Governments formulating of this case???

23. Section 2515 of Title 18 U.S.C. prohibits the use of evidence obtained by illegal electronic surveillance in the grand jury's investigation. See In re Mintzer, 511 F. 2d 471, 472, 73 (1st cir. 1974) (per curiam); 18 U.S.C. Section 3504 (1970) where the Government is required to affirm or deny allegations of use of tainted evidence in judicial proceeding.

24. Let there be no question that Plaintiff repeatedly passed this objection, continues to raise this objection, and states unequivocally that the United States Attorney knew that much of the material used in this instant trial was declared tainted from a prior matter. See United States v. Crutchely, 502 F. 2d 1195, 1200 and N.5 (3rd cir. 1974); Pretrial Disclosure of Federal Grand Jury Testimony, 48 Wash. L-Rev. 423 (1973)

25. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that this Court:

(a) Adjudge and declare that defendant Beller did and is presently involved in a trial in which the element of pretrial publicity is so contaminate as to make a future trial of this Plaintiff unfair on its face;

(b) Adjudge and declare that defendant the United States Attorney for the Southern District of New York knowingly and willfully used illegal evidence;

(c) Adjudge and declare that defendant Beller Opened the Trial for the Government and set forth allegations against this plaintiff with the full and complete knowledge that this plaintiff is not presently on trial and is not otherwise available to counter the terrible prejudice of such Opening remarks.

(d) Adjudge and declare that a chart now presently displayed in the courtroom imports prejudicial and irreparable implications against this Plaintiff;

(e) Direct defendants to cancel outstanding Order prohibiting Plaintiff from attending the trial and direct that Plaintiff attend the trial;

(f) Grant such other and further relief as to the Court may seem just and proper.

Dated: New York, New York

August 17th 1976

LEOLUCA GUARINO, PRO SE
150 Park Row 11 North
New York, New York 10007

By Leoluca Guarino
Leoluca Guarino

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

LEOLUCA GUARINO,

Relator,

-against-

THE ATTORNEY GENERAL OF THE UNITED
STATES, THE UNITED STATES ATTORNEY
FOR THE SOUTHERN DISTRICT OF NEW YORK,
DANIEL J. BELLER, UNITED STATES
MARSHAL FOR THE SOUTHERN DISTRICT OF
NEW YORK, and THE WARDEN OF THE
METROPOLITAN CORRECTIONAL CENTER,

AFFIDAVIT IN SUPPORT
OF AN APPLICATION FOR
AN ORDER TO SHOW CAUSE,
WITH STAY

76 Cr. 324

Defendants.

-----x

STATE OF NEW YORK)
 ss.:
COUNTY OF NEW YORK)

LEOLUCA GUARINO, being duly sworn, deposes and says:

1. On February 3, 1972, Steven Dellacava, Jack Brown, and relator, were arrested by the New York City Police Department, for conspiracy to violate the narcotic laws. On February 4, 1972, the case was dismissed for lack of evidence. The arrest was made from a conversation overheard on an illegal wiretap, see United States v. Capra, 501 F. 2d 267.

2. On April 13, 1973, a four count indictment (73 Cr. 331) was handed down, charging Jack Brown, Dellacava, Relator and others with conspiracy and substantive violations. At the time, Jack Brown was a fugitive, (see docket entry), and on August 1, 1974, that indictment was NOLLE PROSEQUI, as to all defendants.

3. On May 16, 1973, a superseding indictment (s73-460) was handed down, SDNY.

4. All defendants, except Jack Brown and those severed, were found guilty, on all counts, after a nine week jury with hearings trial in front of the Honorable Marvin E. Frankel. The conspiracy was later reversed by the Court of Appeals, see United States v. Capra, supra: "The judgments of conviction against Capra, Guarino and Dellacava on the first or conspiracy count are reversed because of the admission into evidence of the recordings and transcripts of the illegal electronic interceptions of their conversations and the testimony regarding the resulting police surveillance of their activities." The same wiretaps as set forth in one.

5. Approximately 2-1/2 years after imprisonment, (relator received an 18 year sentence, later reduced to 14 years by the Honorable Judge Marvin E. Frankel), relator was indicted on the instant case, 76 Cr. 324.

6. Arraigned in late April, 1976, in front of the Honorable Judge McMahon, relator pleaded "double jeopardy"; the court entered a plea of not guilty.

7. On May 5th or 6th, relator was brought before the Honorable Richard Owen, he informed the Court of the fact that he thought he had been illegally arraigned and his fears that the whole case against him was tainted. The Court scheduled relator to be brought before a Magistrate, in order to pick counsel of his choice; this was never done. After several more appearances before the Honorable Richard Owen, suitable counsel for such a complex case could not be attained, and relator is proceeding pro-se.

8. Numerous motions have been filed by relator on his own behalf, and severance was granted on June 24, 1976. All other motions are still pending.

9. In August of 1975, Jack Brown was NOLLE PROSEQUI, on s73-460: "4. Brown was named only in count one of the indictment 73 Cr. 460, the conspiracy count. The Judgments of conviction on Count one against Capra, Guarino and Dellacava were reverse by the Court of Appeals because of the illegal electronic interceptions of their conversations and the testimony regarding resulting police surveillance of their activities. The evidence against Brown consists entirely of conversations intercepted from this same wiretap and police surveillance testimony resulting therefrom. Under the circumstances, it is no longer possible to proceed with this prosecution." In view of the foregoing, I recommend that an order of NOLLE PROSEQUI be filed as to the defendant, Jack Brown, on indictment 73 Cr. 460. (See order dated August 11, 1975, signed by Assistant United States Attorney Gerald A. Feffer, and United States Attorney Paul Curran.

10. This unique sequence of events, unusual in the extreme, leaves relator with a 14 year sentence, and the distinct possibility of acquiring additional time, requires relator to ask this Court for permission to attend the trial of United States v. Alvarez et al, as required under the Federal Rules of Criminal Procedure, Rule 7f, and other provisions.

11. Respondent has made numerous requests for discovery, and up to the present time, has received only a non-particular, bill of particulars. All other discovery has been effectively denied respondent. Phone calls and letters to the United States Attorney go unanswered.

12. Upon information and belief, respondent has been informed that his acts, name charts, and other material, are being used at this trial. The prejudicial nature of these methods are such, that respondent has reason to believe, they will irreparably taint this trial.

I make this affidavit in support of my Petition, for an Order to Show Cause, to wit: To be brought into Court on a daily basis, to attend this ongoing trial, to gain access to proper discovery, to be able to communicate with counsel, to obtain copies of the minutes of all prior appearances in this case and copies of the daily minutes of the trial presently underway, free unrestricted access to witnesses and others. I am presently only allowed three visits per week, since members of my family are assisting me in my preparation of this case pro se - I need unrestricted visits.

Woolfish v. Levy, 75 Civ. 6000. This request being made in the interests of Justice and to aid this Honorable Court, in the widest possible scope and depth of back ground, in managing, what is probably the most complicated prosecution, in the history of the Southern District.

Leoluca Guarino 78281
LEOLUCA GUARINO, #78281

Sworn to before me this

17th day of August, 1976.

Patrick H. Guarino, Jr.
Notary Public

PATRICK H. GUARINO, JR.
Notary Public, State of New York
Qualified in Bronx County
No. 1596140
Term expires 3/30/77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

76 Cr. 0324 (VLB)

LEOLUCA GUARINO, et al.,

DEFENDANT.

PORTIONS OF THE RECORD TO BE
TRANSCRIBED FOR APPEAL AND
STATEMENT OF ISSUES ON APPEAL

LEOLUCA GUARINO, proceeding pro se, now moves pursuant to Rule 10, Rules Of Appellate Procedure, Title 23, for the court reporter and/or clerk of the court to transcribe and forward to the Court of Appeals for the Second Circuit the following records of proceedings, motions and documents:

1. Motion for severance submitted on May 13, 1976, together with the court's order granting severance on June 24, 1976.
2. Transcript of the oral argument had in open court in regards to the above.
3. Order to show cause and attached motion submitted on August 17, 1976.
4. Letter of September 9, 1976, protesting removal from MCC as being in violation of the Writ of Habeas Corpus ad prosequendum.
5. Second letter of September, 1976, same as No. 4, above.
6. Third letter reiterating the contents of letters No's. one and two, of October, 1976.
7. Motion of December 2, 1976, alleging a violation of the terms of the Writ of Habeas Corpus ad prosequendum, as well as a denial of a prompt and speedy trial.
8. Motion of December 7, 1976, pursuant to Rule 36, Federal Rules of Criminal Procedure seeking to correct the docket entry sheet.
9. Transcript of pre-trial conferences held between Asst. U.S. Atty. Beller, and the trial court on or about December, 1976, (the first one), and

December 14 and 17, 1976.

10. Transcript of record of proceedings dated November 5, 6, 7, 8, 9, 10, 11 and 12, 1976.

11. Government's second Writ of Habeas Corpus ad prosequendum, dated 12-7-76, with appended affidavit, signed on 12-10-76.

12. Government's Nolle Prosequi of December 21, 1976.

13. The Court's order granting the Government's Nolle Prosequi, and dismissing the defendant's pro se motion of December 2, 1976, as moot. The order was entered on December 28, 1976.

14. The defendant's Notice Of Appeal filed on January 6, 1977-- which was filed by the clerk of the Southern District on February 1, 1977.

15. The memorandum order dated on or about January 5, 1977, denying as moot the defendant's motion pursuant to Rule 36, FRCP, to correct the docket entries.

16. Copy of the information that the prosecutor is required to file, together with the indictment, pursuant to The Rules Of The Southern District, Rule 3(b).

17. Copy of the redacted indictment.

18. Any and all other ex parte proceedings that may have taken place between Government attorneys and the court in regards to the defendant, LEOLUCA GUARINO, and which may possibly be deemed to be of relevance in preparing his appeal from the court's order denying his motion to dismiss the indictment with prejudice, and which is the present basis of the pending appeal.

All of the above minutes, letters and documents, are relevant to the defendant's issues on appeal which embrace the propriety of the Government seeking to nolle prosequi the instant indictment after the defendant moved for a dismissal of the indictment for lack of a speedy trial, inter alia, and the correctness of the trial court's ruling in holding his claims to be moot, by virtue of granting the Government's nolle prosequi. Failure to forward the above requested items to the appellate court will prejudice the defendant's efforts to seek meaningful appellate review.

Yours, etc.,

Leoluca Guarino

Leoluca Guarino #78281
Defendant, pro se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

75 Cr. 0324 (VLB)

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says:
that on this 10th day of February, 1977, he served a copy of the within
papers upon the United States Attorney for the Southern District of New York,
all of which constitute sufficient proof of service.

Yours etc.,

Leoluca Guarino

Leoluca Guarino
Defendant, pro se
PO Box PMB #78281
Atlanta, Georgia 30315

Sworn to before me this
10th day of February, 1977.

Charles C. Mott

Parole Officer: Authorized by the Board
July 7, 1955 to Administer Oaths (18 U.S.C.
4004).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

76 Cr. 0324

NOTICE OF MOTION, AND MOTION,
TO CORRECT THE DOCKET ENTRIES
PURSUANT TO RULE 36, F.R.C.P.

SIR:

PLEASE TAKE NOTICE, that upon the indictment, all proceedings herein had, and upon the instant motion and affidavit, the defendant, LEOLUCA GUARINO, proceeding pro se, will move this Court, at the United States Courthouse for the Southern District of New York, at a time and place to be set by the Court for an Order granting defendant the following relief:

1. That this Court Order and Direct that the Docket Entries, as to the defendant LEOLUCA GUARINO, be corrected pursuant to Rule 36 of the Federal Rules Of Criminal Procedure so that they may correctly reflect that: (a) that the defendant is his own attorney of record and not Leonard Levenson, Esq., of 11 Park Place, New York City, as the docket entry reflects: and (b) for the docket entry sheets to be corrected to the extent that they reflect the many and various pro se motions/letters submitted by the defendant.

That since the defendant is proceeding pro se this motion should be entertained under the liberal guidelines enunciated in Haines V. Kerner (404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594).

For such other and further relief as to the Court may seem just and proper.

DATED: This ____ day of December, 1976.

Yours etc.,

Leoluca Guarino #78281

To: U.S. Attorney's Office
Southern District Of New York
U.S. Courthouse--Foley Square
New York, New York State 10007

David N. Edelstein, Chief Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

76 Cr. 324

AFFIDAVIT

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says:
that he is proceeding pro se as he has been doing since the inception of the
proceedings against him under the above numbered criminal indictment.

1. That the true title of the case is United States v.
Alvarez, et al., and that the defendant, LEOLUCA GUARINO, is but one of
thirty-three (33) individuals mentioned in said indictment.

2. That the defendant/affiant, LEOLUCA GUARINO, submits the
instant affidavit in support of his appended motion for the correction of
the docket entries pursuant to Rule 36, Federal Rules of Criminal Procedure.

3. That since there is a presumption of regularity attending
all criminal proceedings, and records, it behooves this Court to order that
the docket entry sheets reflect the truth so that in the event of trial and
conviction the defendant/affiant may have a proper and adequate record,
reflecting the truth, to appeal from in pursuing that constitutional right.

4. That in regards to the docket entry showing that Leonard
Levenson, Esq., is the defendant/affiant's attorney this entry should be
stricken from the docket entry as being clearly erroneous. The docket entry
of 4-29-76 reflects that Judge MacMahon assigned this case to this Court and
directed that an attorney "report to (his) chambers immediately." On 5-21-76
the docket entry reflects that the defendant/affiant, LEOLUCA GUARINO, .
appeared before this Court and that Leonard Levenson, Esq., was present and
that he was relieved as counsel. The docket entry does not reflect that
this was done at the defendant/affiant's behest when he objected to the
assignment of what he considers to be incompetent counsel due to prior

experience with Mr. Levenson. Thereafter, the docket entry of 6-4-76 reflects that the defendant/affiant refused assigned counsel and this Court entered an order allowing him to proceed pro se. The docket entry does not reflect that this was done because the defendant/affiant objected to the assignment of any attorney less than competent.

5. That the docket entry of 6-8-76 reflects that 2 copies of Criminal Justice Act 20 were filed "approving the payment to Leonard Levenson, 11 Park Place, NYC 10007 as counsel for dft." On that same date there is a further docket entry "appointing counsel for dft. - Leonard Levenson (sic), 11 Park Place, NYC 10007." An additional docket entry, on 6-18-76, reflects that this Court filed an order authorizing the payment of \$300.00 to Mr. Levenson, and other court-assigned attorneys, for investigative purposes.

6. That the defendant/affiant vehemently objects to these docket entries as not reflecting the truth of the matter, i.e., that he has strenuously objected to the appointment of Mr. Levenson, and to any attorney that is less than competent. To this end he has proceeded pro se in the filing of all pre-trial motions and has on numerous occasions put this Honorable Court on notice that he fully intends to proceed pro se at the trial of the indictment herein. (See Faretta V. California, ___ U.S. ___, 17 CrL 3156).

7. That Mr. Levenson has never submitted any pre-trial motions on behalf of the defendant/affiant nor has he conducted any investigatory work on the latter's behalf. Moreover, the defendant/affiant would not permit Mr. Levenson to do any thing on his behalf because of Mr. Levenson's polished incompetence/^{and} whom the defendant/affiant believes to be a mere extension of the prosecutor's office.

8. That numerous motions submitted by the defendant/affiant are not reflected on the face of the docket entry sheets and that the majority of them are still pending before this Court. These motions and/or letters are as follows:

(a) On May 5th or 6th, 1976, the defendant/affiant hand delivered a letter to this Court's Clerk (Mr. Myers) in which he detailed and complained of threats, intimidation, and harassment that he was subjected to, by DEA Agents, on the day that he appeared before Judge MacMahon, i.e., on April 29, 1976. This letter/motion is not noted on the docket

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entries nor has this Court ruled upon it.

(b) On May 13, 1976, the defendant/affiant filed a joint motion outlining his double jeopardy issue, enhanced punishment aspects of a new trial on the conspiracy count of 76 Cr. 0324, and a Bertolotti issue, et.; a copy of this motion was sent to Chief Judge Kaufman. This motion is not noted on the docket entries nor has this Court ruled upon it.

(c) On May 26, 1976, the defendant/affiant filed a letter/motion asking for an order granting him a single cell; unlimited visiting rights; free and unobstructed access to the institutional law library; and unlimited access to the phone. This was requested in order that the defendant/affiant might have the necessary means and facilities to adequately meet and question witnesses and thereby prepare an adequate and proper defense in order to meet the accusations contained in the indictment. This letter/motion is not noted on the docket entries nor has this Court ruled upon it.

(d) On June, 1976, the defendant/affiant filed for a Bill Of Particulars with an accompanying Memorandum Of Law. This motion is not noted on the docket entries; however, an opinion filed on 6-18-76 is reflected as having disposed of some matter that the Government acceded to.

(e) On August 17, 1976, the defendant/affiant filed motions for an order to Show Cause, for a Writ of Habeas Corpus, affidavit and complaint thereto. This motion(s) is not noted on the docket entries; however, an entry on 8-19-76 reflects that this Court "decline(d) to sign this order to Show Cause." but it does not show how the other motions were disposed of.

(f) On September 9th or 10th, 1976, the defendant/affiant submitted a letter/motion objecting to his removal from the MEC as violative of the conditions of the Writ Of Habeas Corpus Ad Prosequendum, and further accusing the AUSA, Beller, of sinister motives in prevailing upon this Court to order the defendant/affiant returned to the Atlanta Penitentiary. This letter/motion is not noted on the docket entries nor has this Court ruled upon it.

(g) On September 17th or 18th, 1976, the defendant/affiant submitted a letter/motion from the segregation unit of the Petersburg Reformatory reiterating the issues set forth in his letter/motion of September 9th or 10th, as noted above. This letter/motion is not noted on the docket entries nor has this Court ruled upon it.

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(h) On October 1, 1976, the defendant/affiant submitted a letter/motion seeking to ascertain the status of the Writ of Habeas Corpus Ad Prosequendum, and an itemized listing of all letter/motions received by this Court as well as the disposition of each. This letter/motion is not noted on the docket entries nor has this Court ruled upon it.

(i) On October 6, 1976, the defendant/affiant submitted a motion and memorandum of law based on the Government's violation of 18 U.S.C. Section 201(h)(1). On the same date the defendant/affiant also submitted an additional motion requesting the psychiatric examination of the key Government witness, Jack Brown, with accompanying affidavit in support and memorandum of law thereto. The defendant/affiant does not know if these two latter motions appear on the docket entries; however, he does know that of this date, December 6, 1976, he has not received any ruling on it from this Court.

(j) On December 2, 1976, the defendant/affiant submitted a motion seeking the dismissal of the instant indictment, with prejudice, and citing United States V. Mauro (20 CrL 2146) as authority in an accompanying memorandum of law thereto. An affidavit in support was also submitted. The defendant/affiant does not know if said motion appears on the docket entries and he assumes that this Court has not yet ruled upon it.

9. That the defendant/affiant has proceeded pro se in the submission of all of the above enumerated motions.

WHEREFORE, under the facts and the law the defendant/affiant respectfully requests that this Honorable Court enter an Order granting the relief herein sought.

Yours etc.,

Leoluca Guarino #78281
Defendant-Affiant pro se

Sworn to before me this
7th day of December, 1976.

Charles C. Mitty

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

LEOLUCA GUARINO, et al.,

DEFENDANT.

76 Cr. 9324

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF GEORGIA)
COUNTY OF FULTON) SS:

LEOLUCA GUARINO, after being duly by law sworn, deposes and says: that on this 7th day of December, 1976, he served a copy of the instant Motion and Affidavit upon the United States Attorney for the Southern District of New York by placing same, in a sealed envelope, in the PMB Box for purposes of being forwarded to the said United States Attorney via the United States Mail, all of which should constitute sufficient proof of service. Additionally, copies of the instant papers are also being forwarded to David N. Edelstein, Chief Judge, for the Southern District Court of New York.

Yours etc.,

Leoluca Guarino #78231

Sworn to before me this
7th day of December, 1976.

Charles C. Mott